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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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UNITED TRANSPORTATION UNION, *Petitioner,*

v.

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY, *Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTION PRESENTED

Whether the operation of a State-owned railroad, engaged in the carriage of freight in interstate commerce and the provision of long-distance commuter service, is a traditional and integral governmental function, within the meaning of *National League of Cities* v. *Usery*, and therefore constitutionally shielded from the provisions of the Railway Labor Act.

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LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, United Transportation Union, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on September 15, 1980.[1]

### OPINIONS BELOW

The opinion of the Court of Appeals, reported in 634 F.2d 19, and the opinion of the District Court for the Eastern District of New York, not yet reported, appear in the Appendix (hereinafter designated "App.") at 1a-26a and 29a-46a, respectively.

### JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1980 (App. 1a). A timely petition for a

[1] The Brotherhood of Locomotive Engineers, Railroad Yardmasters of America, Brotherhood of Railroad Signalmen, Brotherhood of Railway Carmen, International Association of Machinists and Aerospace Workers, *amici curiae* in the Court below, join in the views expressed in this petition.

rehearing en banc was denied on December 17, 1980 (App. 27a). Upon application by petitioner, this Court extended the time within which to file this petition to April 16, 1981, and later, to May 16, 1981. The Court's jurisdiction is invoked under Section 28 U.S.C. 1254 (1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution and the pertinent sections of the Railway Labor Act ("RLA"), 45 U.S.C. 151 *et seq.*, and of the New York Civil Service Law, Section 200-214 (the Taylor Law), are set forth in full in the Appendix at pages 83a, 57a, and 49a, respectively.

## STATEMENT

### Proceedings Below[1]

This case arose out of a dispute over proposed modification of a collective bargaining agreement between petitioner Long Island Railroad ("LIRR") and petitioner United Transportation Union ("UTU"). UTU is the authorized collective bargaining representative of the LIRR train employees. LIRR is a wholly owned subsidiary of respondent Metropolitan Transportation Authority ("MTA"), an agency of the State of New York.

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[1] The proceeding below draws into question the constitutionality of the application of the Railway Labor Act, *supra*, to the respondents. Since neither the United States nor any agency, officer, or employer thereof is a party, it is noted that 28 U.S.C. 2403(a), may be applicable. So far as is known, no court of the United States has certified that such constitutionality was drawn in question herein.

On December 7, 1979, UTU filed this action in the federal district court for the Eastern District of New York for a declaratory judgment that the LIRR was subject to the Railway Labor Act; that the Railway Labor Act occupied the entire field of labor relations of railroads engaged in interstate commerce to the exclusion of state law, in this case the New York Taylor Law; and that an injunction issue to protect against Taylor Act interference with federally protected rights.

The District Court granted petitioner's motion for summary declaratory judgment. It concluded that the Long Island Railroad is a rail carrier engaged in the transportation of freight in interstate commerce and is therefore subject to the Railway Labor Act (App. 36a). Further, it held (1) that "employees of the Railroad who have exhausted the mandatory bargaining and mediation procedures outlined in the [Railway Labor] Act, have a federally guaranteed right to strike" (App. 39a); and (2) that under *California* v. *Taylor*, 353 U.S. 553, the right to strike was not impaired by the fact that the employer was a state agency (App. 38a).

The Court of Appeals reversed. It held that reversal was dictated by "the rationale of *National League of Cities* v. *Usery*, 426 U.S. 833" (App. 3a). It concluded that in so far as the application of the RLA to the LIRR "directly displaces the State's ability to structure employee-employer relationships and to make essential governmental decisions", it is not within the authority granted Congress by Article 1, Section 8, Clause 3 of the Constitution (App. 14a). In reaching this conclusion, the Court announced that the scope of essential government services for purposes of *National League* "is gauged not only in terms of the nature of a public service, but also its availability in the market place" (App. 22a). The

Court recognized that "the LIRR's freight service provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (App. 9a), but applying a balancing test, it struck the balance in favor of the State interest (App. 25a).

**Facts**

The Long Island Railroad has for more than 150 years served as an interstate freight and passenger railroad link on Long Island, New York.

The character of this railroad reflects the physical structure of the island whose industries and people it serves. Long Island is an elongated insular projection, paralleling the entire length of the State of Connecticut. It is bounded on the north by Long Island Sound, separating it from Connecticut's south shore. The Atlantic Ocean is on its east and south and the Narrows, New York Bay and the East River form its west and northwest boundaries. It is connected by a series of bridges across the East River with Manhattan and the Bronx in New York City. It is about 118 miles long and 23 miles wide at its widest point, covering a land mass of about 1700 square miles. It is divided into four counties: Nassau, Suffolk, Queens and Kings, the last two of which are metropolitan boroughs of New York City.

The Long Island Railroad radiates throughout this entire land mass with 325 miles of main line track and 101 miles of branch line track. The most remote point of its service is the town of Montauk, Long Island, the island's end point, more than 100 miles or about three hours distant from Manhattan.

Incorporated on April 24, 1834, LIRR is one of the oldest railroads in the United States. In 1966 New York

State acquired ownership of LIRR through the respondent Metropolitan Transportation Authority, by stock purchase from the Pennsylvania Railroad Company. According to the records of the U.S. Department of Transportation, the Federal Government has poured millions of dollars into the LIRR since its acquisition by the State to improve and modernize its service.[3]

LIRR has at all times prior to this case considered itself a carrier subject to all federal railroad laws applicable to railroads in interstate commerce, including the Railway Labor Act[4] (J.A. 365).[5] It was not until after this action was filed, that respondents on February 8, 1980, "changed their posture completely by converting the Railroad from a private stock corporation to a public benefit corporation whose employees would be facially subject to the Taylor Law." (Fdg. of District Court, App. 31a.)

The district court found and the Court of Appeals confirmed that LIRR "is a necessary physical link with other railroads in the movement of a heavy volume of interstate freight via the New York City gateway between Long Island and other parts of the United States" (J.A.

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[3] The figure compiled by the Department exceeds $450,000,000 for the period 1967 to 1980. See also Moody's Transportation Manual, p. 212 (J.A. 410).

[4] Interstate Commerce Act, 49 U.S.C. 10501; Railway Labor Act, 45 U.S.C. 151; Railroad Retirement Act, 45 U.S.C. 231, Railroad Unemployment Insurance Act, 45 U.S.C. 351; Railroad Safety Improvement Act, 45 U.S.C. 39; Railroad Boiler Inspection Act, 45 U.S.C. 22; Federal Employers Liability Act, 45 U.S.C. 51; Labor-Management Reporting and Disclosure Act, 29 U.S.C. 401; Rehabilitation Act of 1973, 29 U.S.C. 794; Norris La Guardia Act, 29 U.S.C. 101.

[5] Reference to "J.A." herein is to the Joint Appendix filed in the Court of Appeals.

364). During 1978, it generated more than $18 million from its freight operations serving "numerous Long Island concerns, such as aircraft manufacturers, supermarket chains, building suppliers, food processors, and farms", interchanging "freight with more than a dozen other railroads which are interstate carriers" (J.A. 362-364).

LIRR has historically provided rail transportation not only for freight but for passengers throughout the entire length and breadth of Long Island, a land mass larger than Rhode Island.[6] Its commuters number about "90,000 regular Long Island passenger making two trips each day" (J.A. 269), less than 4% of the population of Nassau and Suffolk Counties of Long Island, (U.S. Census, 1980), a fraction of this percentage if the population of Queens County (which though a borough of New York City is served by the LIRR) is included.

The collective bargaining negotiations central to this dispute adhered to the form prescribed by the Railway Labor Act, consistent with all prior negotiations on this and all other interstate railroads since the passage of the Federal Railroad Labor Act in 1926.

Petitioner UTU served the LIRR with a notice under Section 6 of the Railway Labor Act. This notice triggered the time consuming and RLA complex procedures discussed in *Railroad Trainmen* v. *Jacksonville Terminal*, 394 U.S. 369 at 378 (1969) in which it was explained that:

> That Act provides a *detailed framework to facilitate the voluntary settlement of major disputes.* A party

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[6] Freight-commuter railroads are wholly distinguishable from mass transit systems within the urban transit industry. Their history and their customs and usages are inseparably identified with the railroad industry of which they have been and remain, an integral

> desiring to effect a change of rates of pay, rules or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President", who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10 [emphasis added].

This action for declaratory relief was filed December 7, 1979, after 23 months of negotiations. On the following day, petitioner, having exhausted the RLA mandatory procedures, began a strike which ended six days later when the President of the United States, upon finding that the strike threatened " substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation services" issued Executive Order 12182 under Section 10 of RLA, establishing a Presidential Emergency Board 192 "to investigate and report respecting" the dispute. The action effectively imposed a moratorium on self-help actions by either party for an additional 60 days, expiring

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part. These freight-commuter railroads have always been classified as part of the railroad industry subject to the unique federal railway laws. See pp. 20-21, *infra*.

February 14, 1980. During a litigation interval involving state and federal court injunctions, reflecting the conflict between state and federal labor relations systems, and while the matter was pending before the Court of Appeals, the parties signed an agreement on April 11, 1980 (App. 6a).

On September 22, 1980, the National Mediation Board (NMB) ordered petitioner, respondent and the Staten Island Rapid Transit Operating Authority (SIRTOA) and all of the rail labor organizations representing the classes and crafts of employees employed by LIRR and by SIRTOA to show cause why the NMB should not cease to exercise jurisdiction over LIRR and SIRTOA, in light of the decision of the Second Circuit in this case. On March 9, 1981, the NMB issued an interim order that unless the decision of the Second Circuit in this case is modified or reversed, it "is bound by the determination of that Court that the interests of the State of New York outweigh those of the Federal government, and that the RLA does not pre-empt application of the Taylor Law to the carriers and their employees under the Supremacy clause and Commerce clause of the U.S. Constitution" (App. 72a-73a.)[7]

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[7] The NMB limited its interim order to the withholding of its mediatory services. In its view, the decision of the Second Circuit vitiates only that part of RLA which, under the court's holding, "impairs the State's ability to structure employer-employee relationships" of LIRR, by "eliminat[ing] a key [no strike] provision in the State's legislative effort to provide its citizens with continuous public transportation" (App. 3a, 14a). NMB accordingly announced that it will continue to process LIRR representational cases under the RLA (App. 7a.). Similarly minor disputes will continue to be processed under the compulsory arbitration provisions of the Railway Labor Act.

Respondents MTA and LIRR, joined by the Staten Island Rapid Transit Operating Authority, an MTA subsidiary, have filed

## REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with the decisions of this Court in *California* v. *Taylor,* 353 U.S. 553, *United States* v. *California,* 295 U.S. 175 and *Parden* v. *Terminal R. Co.,* 377 U.S. 184, — confirmed in *National League of Cities* v. *Usery,* 426 U.S. 833, 854, n.18.[8] It misconceives the doctrine of *National League* and extends that doctrine to an area expressly disclaimed by the Court's opinion in that case. And its rationale creates confusion and uncertainty as to the limits of Congress' authority under the Commerce Clause. The issue presented is of major importance, requiring the balancing of the State's interest in the operation of a State-owned railroad free of federal regulation against the federal interest in the protection of interstate

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an action for a declaratory judgment in the federal court for the Eastern District of New York, challenging NMB's position as to the limited scope of the Second Circuit's decision. *Metropolitan Transportation Authority et al.* v. *National Mediation Board,* E.D. N.Y., Civ. 81-0721, filed March 11, 1981.

[8] See also *Helvering* v. *Powers,* 304 U.S. 171, which held that the city-operated elevated railway in Boston (and therefore the salary of its trustees) was not immune from federal taxation as a state governmental activity: "We see no reason for putting the operation of a street railway in a different category from the sale of liquors [in *Ohio* v. *Helvering,* 292 U.S. 360]. In each case, the state with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the state." *Id.* at 227. *A fortiori,* the business of operating an interstate freight and long-distance commuter railroad is, to paraphrase *Helvering,* "within the reach of the federal [commerce] power and is distinct from the usual governmental functions that are immune from federal [regulation] in order to safeguard the necessary independence of the state". The "power to tax involves the power to destroy". *McCulloch* v. *Maryland,* 4 Wheat. 316, 431.

commerce from disruption resulting from industrial discord. The importance of the issue is magnified by implications extending beyond the statute here in question to the entire body of the federal legislation in its application to state railroads, and beyond the area of railroads to other areas of State penetration into historically private business activities. For these reasons, review by this Court is warranted.

1. *California* v. *Taylor* and the related cases, *supra*, upheld the application of federal railroad legislation (the Railway Labor Act, the Rail Safety Act, and the Federal Employers Liability Act) to the operations of state-owned common carriers engaged in interstate commerce. The decision below denies the application of these cases to the LIRR, a state-owned railroad engaged in both the transportation of interstate freight and the provision of long-distance commuter service[9], on the ground that LIRR is the principal provider of railroad transportation service for some 90,000 weekday commuters on Long Island. It makes this distinction despite the presence in this case of the very interstate commerce facts which this Court held to be dispositive in *Taylor* (353 U.S. at 566); *i.e.* that the railroad here "is a necessary physical link with other railroads in the move-

[9] Arguably, the decision below limits the RLA only to the extent that it conflicts with the no-strike provision of the New York Taylor Act. The NMB, in its order of March 9, 1981, has taken the position that the Second Circuit's decision is applicable only to that part of the RLA which, under *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal*, 394 U.S. 369, 378-82, guarantees that railroad employees or employers may resort to self-help once the RLA procedures designed to induce agreement have been exhausted. (App. 71a-72a). As noted above, p. 9, this ruling has been challenged by respondents in an action filed in the federal district court.

ment of a heavy volume of interstate rail freight . . . between Long Island and other parts of the United States" as found by the trial court below (App. 35a) and as recognized by the Court of Appeals in its characterization of the LIRR as "a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (App. 9a). LIRR's freight operations are, at the very least, as "important to the national flow of commerce" as were those of the terminal railroad facilities held subject to federal labor legislation in *Taylor.*

In deviating from *Taylor,* the court below relies principally on the decision of this Court in *National League of Cities, supra,* misconceiving its holding and rationale, and seeking to expand the doctrine of that case in a manner incompatible with its expressly stated exclusion of railroads. *National League* repeatedly declares that the Tenth Amendment restriction on the federal power to regulate State activities under the Commerce Clause is limited to those activities which the States have "traditionally" regarded as part of "integral governmental functions" essential to their "separate and independent existence" as States. (426 U.S. at 845, 851, 852, 854, 855). Further articulating the limits of the Tenth Amendment immunity, *National League* explicitly identifies the operation of a railroad as the example of an activity which is not traditionally an integral function of government and is therefore not within the state's immunity under the Tenth Amendment (833 U.S. at 854, n.18). Accordingly, *National League,* expressly confirming *Taylor* and the cited railroad cases, cautions that:

> the holding of the *United States* v. *California* . . . is quite consistent with our holding today. There California's activity to which the Congressional

> command was directed was not in an area that the states have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce . . ." For the same reasons, despite Mr. Justice Brennan's claims to the contrary, the holding in *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), and *California* v. *Taylor*, 353 U.S. 553 (1957), are likewise unimpaired by our decision today. [*Ibid.*]

In reaching the opposite conclusion as to the LIRR, the Second Circuit establishes a new and broader basis for marking out the area of Tenth Amendment immunity. In lieu of the National League tests of "traditionality" and "integrality", the Second Circuit prescribes a new "essentiality" test, with "essentiality [to be] gauged not only in terms of the nature of the public service, but also its availability in the market place." (App. 23a) — as distinguished from the concept of "functions essential to separate and independent existence" of States *qua* States. 426 U.S. at 845, 851.

The question whether the services of state-owned railroads are "essential to the public" and are "of necessity provide[d] almost exclusively by state and local governments" (upon which the decision below turns App. 17a) were not deemed relevant by this Court in the railroad cases confirmed by *National League*. Federal regulations in those cases were upheld because the operation of a railroad engaged in interstate commerce was not a traditional function essential to the sovereign existence of the States as States.

Thus, in relying on LIRR's service to some 90,000 Long Island weekday commuters to justify its departure from the *National League* caveat, the Second Circuit substantially broadens the *National League* concept

beyond the limits expressly stated by this Court. The affirmation of that express limitation by the Chief Justice in *Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 390, 424 ("it should be evident, I would think, that the running of a [railroad] enterprise is not an integral operation in the area of traditional governmental functions"), citing the *National League* caveat *(supra,* at 854), was cavalierly dismissed by the Second Circuit as "limited to its antitrust context" (App. 20a).

The "certain possible implications of this Court's opinion" in *National League,* which Mr. Justice Blackmun did not "read so despairingly as does my Brother Brennan" (426 U.S. at 856), have now surfaced in the application of the *National League* concept to this case by the Second Circuit. These implications, which "troubled " Justice Blackmun (*ibid.*), have also surfaced in *Amersbach* v. *City of Cleveland,* 598 F.2d 1033 (C.A. 6) and in *Alewine* v. *City Council of Augusta, Civ.* 179-113 (S.D. Ga., Jan. 13, 1981), as yet unreported, applying the *National League* concept to a municipally owned airport and to a municipally owned and operated city bus system, respectively. Cf. *Joiner* v. *City of Macon,* Civ. 79-287-MAC (M.D. Ga. Apr. 24, 1981) as yet unreported, where the court held that the operation of a municipally owned bus company serving 10% of the city's citizens was not "a traditional function essential to the sovereign existence of the state".

In broadening the scope of *National League* immunity to include a state operated interstate freight/commuter railroad, the court below deviates from a line of decisions which have properly given a narrow construction to *National League.*[10] The broadened criteria suggest

[10] *Public Service Company of North Carolina, Inc.* v. *Federal Energy Regulatory Commission,* 587 F.2d 716 (C.A. 5), *cert.*

earlier labels for determining State immunity, such as "sovereign or "proprietary" or "essential", which have long been discounted as "rhetorical absolutes". See *New York* v. *United States,* 326 U.S. 572, 576. The immediate and potential impact of the new criteria on the application of federal laws to expanding state services, particularly in transportation, provide compelling reasons why the *National League* concept should be clarified by this Court at this time.

2. Having concluded that the commuter services provided by LIRR are within its amplified definition of the terms "traditional" and "integral governmental functions", as used in *National League,* the Second Circuit proceeds to find that the RLA "operates to displace 'essential government decisions'" because it precludes the state from applying the Taylor Law to enjoin the exercise of the federally guaranteed right of railroad employees to withdraw from service upon full compliance with the provisions of federal railway labor law.[11] (App. 15a).

But the RLA does not displace the State's power to make "essential government decisions". Cf. *Pearce* v. *Wichita County,* 590 F.2d 128 (C.A. 5), holding that

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*denied,* 444 U.S. 879 (1980); *Pearce* v. *Wichita County,* 590 F.2d 128 (C.A. 5); *Peel* v. *Florida Department of Transportation,* 600 F.2d 1070 (C.A. 5); *Joiner* v. *City of Macon, supra.*

[11] Respondent MTA waited until February 8, 1980, to reorganize LIRR to bring it within the literal terms of the Taylor Law (App. 31a, 36a). Throughout the preceding seven decades of this century, LIRR was admittedly subject to the Railway Labor Act, the Norris La Guardia Act, and other earlier federal laws bearing on railway labor relations, such as the Transportation Act of 1920, the Adamson Act, the Newlands Act of 1913, the Erdman Act of 1898. At no time, prior to that date, was the LIRR subject to the terms of the Taylor Law.

Congress may constitutionally impose the provisions of the Equal Pay Act, 29 U.S.C. 206(d) on state employers. Under provisions of the EPA, the state would be required to raise the pay of women employees to that of men doing equal work (section 206(d)(1)); but the Fifth Circuit deemed "[t]he ability to pay female employees less than those paid to male employees is not among the 'functions essential to [the] separate and independent existence' of the States" (590 F.2d at 132). Cf. also *Peel* v. *Florida Department of Transportation,* 600 F.2d 1070 (C.A. 5) applying the Veteran's Reemployment Act, 32 U.S.C. 2021-6, to State employers, in which the Fifth Circuit rejected the argument "that the reemployment provisions of the Act 'directly displace the State's freedom to structure integral operations in areas of traditional functions' " (at 1083).

Like the Equal Pay Act and the Veterans Reemployment Act, the Railway Labor Act does not impose federal standards on the decisions the State must make in regard to the wages, hours or conditions of employment of its employees. It requires only that the State, in the determination of those terms, bargain collectively in good faith with the chosen representatives of employees engaged in the operation of interstate railroads.

Nothing in the Railway Labor Act "compel[s] agreement between the employer and the employees". *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 549. It merely requires the parties to confer and negotiate, in recognition of the fact that "in the case of the carriers, experience has shown that . . . 'when there was a willingness . . . to meet [the employees'] representatives for a discussion of their grievances . . . strikes had been avoided'". *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45; *Virginian Ry. Co.,* 300 U.S.

at 549. Federal laws prescribing the channeling of collective bargaining therefore cannot be classified as operating "to force directly upon the States [Congress's] choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." See *National League,* 426 U.S. at 855.

*National League* was concerned with the 1974 Amendments to the Fair Labor Standards Act (FLSA) extending the minimum wage and overtime provisions of the FLSA to state activities. The Amendments were "directed, not to private citizens, but to States as States." *National League* at 845. By that extension, Congress was deemed by this Court to "displace state policies regarding the manner in which [the States] will structure delivery of those governmental services which their citizens require" (*id.* at 847).

Unlike the 1974 FLSA Amendments at issue in *National League,* the Railway Labor Act of 1926 and its Amendments of 1934 were directed, not to the States but to the operation of interstate railroads. When New York took over the LIRR in 1965, it chose to enter a field whose labor relations were long governed by federal law.

Since the incorporation of the LIRR in 1834, the making of "choices and decisions in connection with [its] role as provider of certain public services" had been the role of private corporate managers operating with the same independence and responsibility as that exercised by railroad management throughout the United States (App. 13a). As stated by the MTA at the time of its acquisition of this property in 1965, no change took place in this respect (New York Times, Jan. 21, 1966 at p. 16). The new managers exercised the same degree of control in decision making as had their predecessors.

The Railway Labor Act did not, and does not, intrude into this process any more today than it did at any time in its history. Management maintains its freedom of choice in collective bargaining.

The *National League* concept of displacement of State policies can therefore not be squared with the legislative impact of time tested railroad legislation on interstate railroads subsequent to their purchase by the State. The State takes the railroad as it finds it.

3. The Second Circuit, "after weighing the usurpation of state policy-making and the invasion of integral state functions against the reason for the exercise of the federal commerce power" (App. 23a), concluded that "the State has a far greater interest in dispute resolution relating to the LIRR than does the federal government" (R. 24a). This conclusion rests upon the premise that "the freedom to strike [prohibited by Taylor Law] . . . could result in requiring the state to pay higher wages in order to avert the devastating economic injury that a halt in the commuter transportation system would cause" (App. 14a-15a). This conclusion that the Taylor Law prohibition of strikes is necessary "to avert devastating economic injury" is precluded by the indisputable facts. The records of the New York Public Employment Relations Board show that during the period September 1967 to December 31, 1980, there were 279 strikes by public employees subject to the Taylor Law, with an estimated 4,105,000 work days idle (App. 77a), and in the case of public transit employees subject to that law, nine strikes, causing 370,500 idle work days. (*Id.*)

In contrast, there was a single work stoppage by employees of LIRR (November, 1972) between the fiscal years 1965 (when LIRR was purchased by the state) and 1980 prior to filing of this action, causing 175,000 work

days idle. The dispute which gave rise to this case resulted in a six-day strike in December, 1979, by employees represented by petitioner[12] and a two day strike in April, 1980, by other LIRR employees (App. 81a), together causing 24,000 man days lost.

The court's misconception of the practical experience under the RLA and under the Taylor Law, in its balancing of federal and state interests, is the consequence of the court's assumption of a hypothesis not asserted by respondents at any stage of this proceeding, and therefore not subjected to proof, briefing, or argument. See *infra,* pp. 19-21.

It is common knowledge that the automobile has been the principal reason for the substantial reduction in passenger train operations throughout the United States. The conditions on Long Island in this respect are not different from those in other sections of the United States. These stoppages do not and cannot have the "devastating economic injury" which the court below assumed in weighing the competing federal and state interests. The automobile takes over.

A railroad facility like the Long Island Railroad, no less than the Belt Railroad in *Taylor,* "is a vital link in the national transportation system." See *Taylor,* 566. "Its continuous operation is important to the national flow of commerce" (*id.*), as recognized in this case by the establishment of Presidential Emergency Board 192. This concern provides the foundation of the federal policy underlying the RLA and other federal laws affecting rail transportation. That policy has been well served

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[12] This work stoppage was terminated on its sixth day upon the establishment of Presidential Emergency Board 192 under Section 10 of the RLA.

by the RLA over a great period of time, on Long Island and throughout the country. Whether the States, by extending their activities to transportation facilities like the Long Island Railroad, can withdraw such operations from the traditional coverage of the Commerce Power raises serious questions of constitutional law requiring clarification by this Court. See *New York* v. *United States*, 326 U.S. at 582; *Helvering* v. *Powers*, 293 U.S. 214, 225.

4. The Second Circuit seeks to revise the *National League* concept of "integral operations in areas of traditional governmental functions" which, it enlarges to "very important public service which has come to be supplied primarily by state and local governments" (App. 17a). The broad implications of this expansion are clearly visible in its application to the facts of this case. The LIRR has been subject to federal laws governing the operations of interstate railroads as long as any other railroad in the United States (See *supra*, pp. 4, 16). Respondent MTA, by its purchase of the stock of LIRR in 1966 and by thereafter "engaging in interstate commerce by rail subject[ed] itself to the commerce power" and to the continuous application of all of the federal laws governing railroads. *Taylor*, 353 U.S. at 568; *U.S.* v. *California*, 297 U.S. at 184; *Helvering* v. *Powers*, 293 U.S. at 225. By "venturing into the Congressional realm" it assumed the conditions that Congress, under the Commerce Clause, attached. *Parden* 377 U.S. at 196.

5. The assumption of the court below that "the LIRR . . . as a provider of passenger transportation, furnishes a very important public service which has come to be supplied primarily by state and local governments" (App. 17a) has no support in the record or elsewhere. It is not based on evidence, was not briefed, and was not

mentioned in oral argument. Cf. *Taylor*, 353 U.S. at 557, n.2. The indisputable fact is that commuter railroad services outside the New York metropolitan area are predominantly supplied by twelve privately owned or operated interstate railroads, carrying commuters in nine major metropolitan areas.[11] In the five-state northeastern sector, the passenger trains of Consolidated Rail Corporation carry 231,000 commuters to work each day (New York Times, April 19, 1981, Business Section, p. 1). The only state-owned and operated railroads in the United States are to be sound in the New York metropolitan area.

Since the state and local governments are not the primary providers of commuter railroad services, the court's key premise for its conclusion that the operators of the LIRR are within the area of Tenth Amendment protection must fail.

Perhaps, the Second Circuit mistakenly considered interstate freight/commuter railroads, such as those described above, as part of the urban mass transportation industry consisting of buses, subways, cable cars, ferries and other mass transit modes engaged in local and suburban mass transportation over regular routes and on regular schedules. In comparing LIRR with subways and other modes of urban mass transit (see App. 17a, n. 20), the court failed to recognize the distinction between railroads carrying both interstate freight and

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[11] *Transit Fact Book*, American Public Transit Association, 1978-1979 ed., at pp. 74-75; J.A. 403-404. The twelve carriers are the Baltimore & Ohio, the Burlington Northern, the Chicago & North Western, the Milwaukee, the Chicago Rock Island, the Chicago South Shore, the Illinois Central, the Boston & Maine, Grand Trunk Western, Norfolk & Western, Pittsburgh & Lake Erie, and the Southern Pacific.

long distance commuters and urban systems carrying local and suburban passengers.[14] The history and practices of the former have always been identified with the railroad industry. "The railroad world for which the [Railway Labor] Act was designed has been described as a state within a state" for which Congress has provided "'techniques peculiar to [itself]' ". *California* v. *Taylor* 353 U.S. at 565-566. Commuter railroads have accordingly never been included within the standard urban transit industry classification of "companies and systems primarily engaged in local and suburban mass passenger transportation over regular routes and on regular schedules." U.S. Bureau of the Budget, *Standard Industrial Classification Manual* (Washington, G.P.O., 1967), pp. 203-205. If the court below indeed included the interstate freight/commuter railroads in the urban mass transportation industry, then the questions raised herein are of even greater importance and significance.

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[14] Commuter railroads traditionally provide railroad passenger service to the far distant suburbs and exurbs in the outer reaches of the central cities (*op. cit.* at 74); *e.g.*, the service provided by LIRR to Montauk in Suffolk County, some 128 miles and three hours distant from New York; the service provided by the Chicago North Western between Highland Park, Illinois and downtown Chicago. Municipal ownership of city bus and subway systems is the direct and immediate result of federal legislation enacted in 1964 to provide federal assistance "to State and Local Governments in financing . . . [mass transit] systems, to be operated by public or private transportation companies . . ." 49 U.S.C. 1601(b)(3). Prior to enactment of the Urban Mass Transportation Act, 95% of the nation's transit companies were privately owned. Urban Mass Transportation Administration, U.S. Department of Transportation, *A Directory of Public Transportation Service*, July 1979, p. 17.

## CONCLUSION

The decision below is in direct conflict with decisions of this Court and distorts the holding and the rationale of *National League*. It raises fundamental questions concerning the balance of federal and state power as affected by the implications of *National League*. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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# APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1120—September Term, 1979

(Argued April 18, 1980 Decided September 15, 1980)

Docket No. 80-7199

UNITED TRANSPORTATION UNION,

*Appellee,*

v.

LONG ISLAND RAIL ROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY OF NEW YORK,

*Appellants.*

Before:

MULLIGAN, *Circuit Judge*, and
SPEARS* and SWEET,** *District Judges.*

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* United States District Judge for the Western District of Texas, sitting by designation.

** United States District Judge for the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Eastern District of New York, Hon. Jacob Mishler, Judge, granting a declaratory judgment that appellee's members have the right to engage in self help under the Railway Labor Act and permanently enjoining appellants from further prosecuting any state court action based on the Taylor Law.

Reversed.

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EDWARD D. FRIEDMAN, Washington, D.C. (Harold A. Ross, Sidney Fox, Highsaw, Mahoney & Friedman, P.C., Washington, D.C.; Shapiro, Shiff, Beilly, Rosenberg & Fox, New York City; Ross & Kraushaar, Cleveland; Sanchez & McKay, Congers, N.Y., of counsel), for Appellee.

EUGENE P. SOUTHER, New York City (Anthony R. Mansfield, Todd M. Brinberg, Michael W. Kelly, Sheri A. Van Greenby, Seward & Kissel, New York City; Thomas M. Taranto, Jamaica, N.Y., of counsel), for Appellants.

RONALD M. ETTER, Acting General Counsel, National Mediation Board, Washington, D.C., brief for the United States as *Amicus Curiae*.

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SWEET, D.J.

This appeal presents the question of whether employes of the Long Island Rail Road Company (the "LIRR") are subject to the provision in New York's Taylor Law, N.Y. Civ. Serv. Law §§ 200-214 (the "Taylor Law"), prohibiting strikes by public employees,[1] or the provision in the Railway Labor Act, 45 U.S.C. §§ 151 et seq. (the "RLA"), allowing for such self help.[2] Resolution of this question presents the difficult and vexing task of determining the line which separates state and federal power in the penumbra where both state and federal legislation have been enacted. Since in this case we conclude that the RLA impairs the State's ability to structure employer-employee relationships in its role as sole provider of an essential public service, the rationale of *National League of Cities v. Usery*, 426 U.S. 833 (1976) requires that we reverse the decision of the district court.

## I

The LIRR is a rail common carrier serving five counties within the metropolitan New York City area. It was acquired by New York State in 1966 through the agency now known as the Metropolitan Transportation

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1 N.Y. Civ. Serv. Law § 210 (1) provides:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage or condone a strike.

2 Although not explicitly set forth in the RLA, the parties may resort to self-help once the RLA's procedures designed to induce agreement have been exhausted. *See Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969).

Authority (the "MTA"), which continues to have day-to-day responsibility for the operation of the LIRR.

The LIRR carries approximately 250,000 passengers each week day and is the only common carrier by rail serving the public and industries in Nassau and Suffolk Counties. While its physical operations are solely within New York State, it interchanges freight with more than a dozen interstate rail carriers and handles from 800-1000 freight cars per week. Its revenue from freight operations in 1979 was in excess of $12.1 million. These freight revenues have decreased steadily over the years and now provide a fraction of its total income, which is estimated at more than $300 million.

The appellee United Transportation Union (the "UTU") is one of seven collective bargaining representatives for the LIRR operating and train employees. On December 7, 1979, as the parties were on the verge of exhausting the collective bargaining procedures provided by the Railway Labor Act, the UTU filed this suit in the Eastern District of New York seeking (1) a declaratory judgment that the relationship between the parties was governed by the RLA and that the employees could thus not be subjected to the sanctions of the Taylor Law in the event they engaged in self help; and (2) injunctive relief to protect those rights of the employees guaranteed by the Act, including an injunction against the commencement or prosecution of a state court action seeking to invoke the Taylor Law.

The next day, the unions, including the UTU, went on strike. On December 14, 1979, a Presidential Emergency Board was established pursuant to § 10 of the RLA, 45 U.S.C. § 160, and the employees returned to work.[3]

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[3] The "cooling off" period triggered by the President's action was to expire 60 days later, on February 14, 1980.

Appellants moved to dismiss this action but before the motion was heard, on February 8, 1980, converted the LIRR from a private stock corporation to a public benefit corporation whose employees would be at least facially subject to the Taylor Law. On February 12, the UTU responded by moving for a temporary restraining order and preliminary injunctive relief restraining the defendants from commencing a state court action pursuant to the Taylor Law to enjoin a strike by UTU members.

Following additional litigation[4] the UTU moved for summary judgment. In his opinion granting the motion, then Chief Judge Jacob Mishler found that the LIRR is a "carrier" engaged in interstate transportation and therefore subject to the Railway Labor Act. After further analysis, he concluded that the federal scheme preempts the State from regulating the labor relations of the railroad's employees, rejecting the invitation to find that such regulation improperly displaces the State's freedom to structure integral operations in areas of traditional governmental functions.

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4 On February 13, the LIRR commenced a suit against the UTU and other unions in Supreme Court, New York County, seeking an injunction under the Taylor Law against the impending strike. It was represented in that action by the State Attorney General. A temporary restraining order issued in that case, and on February 14, the unions removed that action to the United States District Court for the Southern District of New York. The unions then moved to transfer and consolidate the action with the instant action pending before Judge Mishler, and the LIRR moved to remand the state action. The latter motion was granted by Chief Judge Lloyd MacMahon on February 25.

A second procedural sideshow was instituted on February 27, when the UTU moved in Supreme Court, Queens County, to transfer the state action from New York County to Queens. That motion was denied on March 3, 1980, thwarting an apparent attempt to remove the action to the Eastern District of New York.

5 *United Transp. Union v. Long Island R.R., et al.*, No. 79-3118, slip op. at n.4 (E.D.N.Y. Mar. 5, 1980).

The district judge then issued a permanent injunction restraining the LIRR and the MTA from taking any action in state court based on an alleged violation of the Taylor Law. The UTU was also enjoined from engaging in any "self help" pending this Court's review of the case.[6]

## II

Appellants argue, at the outset, that the State Attorney General is an indispensable party to this action because he is independently obligated to take the action that the UTU has sought to enjoin. Specifically, they refer to N.Y. Civ. Serv. Law § 211, which provides that the chief legal officer of the government involved shall apply to the supreme court for an injunction against a threatened violation of the Taylor Law.[7]

In this case the joinder of the Attorney General as a party is not necessary for the granting of complete relief, nor would the disposition of the action in his absence leave any of the parties subject to a substantial risk of incurring inconsistent obligations. Fed. R. Civ.

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[6] The labor dispute that precipitated this action was ultimately settled on April 11, 1980.

[7] N.Y. Civ. Serv. Law § 211 provides in pertinent part:

> Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that public employees or an employee organization threaten or are about to do, or are doing, an act in violation of section two hundred ten of this article, the chief executive officer of the government involved shall (a) forthwith notify the chief legal officer of the government involved, and (b) provide such chief legal officer with such facilities, assistance and data as will enable the chief legal officer to carry out his duties under this section, and, notwithstanding the failure or refusal of the chief executive officer to act as aforesaid, the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation.

P. 19(a).[8] To begin with, there is no authority for the proposition that the Attorney General must proceed as a plaintiff in his own name in addition to bringing the action of the aggrieved state parties. Instead, the Attorney General or other "chief legal officer" must simply act as legal representative of such agencies in Taylor Act proceedings. *See Yorktown Central School Dist. No. 2 v. Yorktown Congress of Teachers*, 42 A.D.2d 422, 348 N.Y.S.2d 367, 371 (2d Dept. 1973).

Since in this case the Attorney General did not represent appellants, it could be argued that he should have been joined as a separate, indispensable party. However, the record indicates that the Attorney General was involved in a related action in state court, *see* note 4 *supra*, and that he undoubtedly had knowledge of the instant action and could have participated therein had he chosen to do so. Moreover, in light of the fact that the MTA and LIRR, in opposing the injunction, took the same position as the Attorney General would have taken, he cannot be heard to claim that the disposition of the action in his absence impairs his ability to protect the State's interests. Fed. R. Civ. P. 19(a)(2)(i).

Finally, disposition of this action without the presence of the Attorney General would not subject any party to a substantial risk of incurring inconsistent

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8 Fed. R. Civ. P. 19(a) requires joinder of a party if:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

obligations. As the district judge noted, the Attorney General would be bound by any injunction in this action of which he had actual notice under Fed. R. Civ. P. 65(d).[9] Consequently, this action need not be dismissed for failure to join as an indispensable party.

## III

We agree with the finding of the district court that the Long Island Rail Road is a "carrier" subject to the Railway Labor Act. A "carrier" includes a "carrier by railroad, subject to the Interstate Commerce Act" (the "ICA"). 45 U.S.C. § 151.[10] Such carriers must be involved in transportation outside a single state, 49 U.S.C. § 10501(2),[11] and do not include a street,

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9 Fed. R. Civ. P. 65(d) provides in pertinent part that an order granting an injunction:

> is binding only upon the parties, to the action, their officers, agents . . . and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order . . . .

10 Section 151 of Title 45 provides in pertinent part:

> When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—
>
> First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act . . . . *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. . . .

11 Section 10501 of Title 49 provides:

> (a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

interurban or suburban electric railway, unless such railway is operating as part of a general steam-railroad system of transportation. 45 U.S.C. § 151.

Appellants do not seriously dispute that the LIRR is subject to the literal terms of the Railway Labor Act. As the district court noted, the LIRR's freight service provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York. Moreover, the LIRR historically has considered itself a "carrier" within the meaning of the RLA, as demonstrated by the facts that it has consistently filed reports required by the ICA and that is employees have received the benefits of the Railroad Retirement Act, the Railroad Unemployment Insurance Act and the Federal Employees Liability Act.[12]

Appellants argue instead that Congress did not intend that the RLA apply to an essentially local

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(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad. . . .

(2) to the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State. . . .

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle.

12 In addition, in a recent decision dealing with another subsidiary of the MTA, the Interstate Commerce Commission noted that the LIRR is a carrier subject to the Railway Labor Act. *Bhd. of Locomotive Engineers v. Staten Island Rapid Transit Operating Auth.*, Finance Docket No. 29011 (Nov. 8, 1979). Since the LIRR was not a party to that dispute the opinion of the ICC is not conclusive, but it does have some persuasive value.

commuter transportation system such as the LIRR simply because it does a limited amount of freight business. They note in this regard that Congress specifically excluded from RLA coverage certain types of local transportation systems that existed at the time of its enactment such as "suburban electric railways" and "street electric railways." 45 U.S.C. § 151.

While it is argued that Congress also would have created an exclusion for the LIRR if it could have foreseen how the railroad would evolve, we decline to legislate such an exception. Apart from a general reluctance to undertake such a task, we note that it is not clear what Congress would have done in this instance. The LIRR's freight business, while declining and less significant than its passenger business, still generates over $12 million in revenues derived from business in interstate commerce. Although this constitutes but a fraction of the revenues of the LIRR, its impact on interstate commerce is of some significance and consequently, any change in the regulation of this type of rail carrier must be left to Congress.

## IV

If the LIRR were a privately owned carrier, the commerce clause regulation would prevail, and no further analysis would be required. The LIRR is a wholly owned subsidiary of a state agency, however, and appellants urge that even if the LIRR is subject to the literal terms of the RLA, that Act may not be enforced so as to allow a strike because it interferes with an integral state function, namely, the State's ability to structure employer-employee relationships in public commuter transportation.

Appellants have relied on *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which the Supreme Court struck down the application of the Fair Labor Standards Act's minimum wage and maximum hour provisions to state employees. In *National League of Cities*, the Supreme Court broke with precedent in finding that Congress may not exercise its power over interstate commerce "to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S.C. at 855. Although it did not fully define the meaning of "integral" or "traditional" state governmental functions, the plurality opinion indicated that they would include typically, fire prevention, police protection, sanitation, public health and parks. *Id.* at 851.

In a short but "pivotal" concurring opinion,[13] Mr. Justice Blackmun stated that he joined the plurality with the understanding that the Court had adopted a balancing approach under which federal regulation will be upheld if the federal interest is "demonstrably greater" than the State's. 426 U.S. at 856. While some commentators argue that the plurality actually rejected any weighing of federal and state concerns,[14] many lower courts have found a balancing approach to be implicit in that opinion. *See, e.g., Virginia Surface*

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13 *State Dep't of Transp. v. United States*, 430 F. Supp. 823, 825 (N.D. Ga. 1976).

14 See Matsumoto, National League of Cities—*From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 Ariz. St. L.J. 35, 71 n.193; Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 U.C.L.A. L. Rev. 1301, 1338, 1340 (1978). *But see* Horowitz, *The Autonomy of the Univ. of California under the State Constitution*, 25 U.C.L.A. L. Rev. 23, 33 (1977) (balancing approach in plurality opinion).

*Mining & Reclamation Ass'n v. Andrus*, 483 F. Supp. 425, 435 (W.D. Va. 1980); *Remmick v. Barnes County*, 435 F. Supp. 914, 915 (D.N.D. 1977); *State of Colo. v. Veterans' Adm.*, 430 F. Supp. 551, 559 (D. Colo. 1977), *aff'd on other grounds*, 602 F.2d 926 (10th Cir. 1979) *cert. denied*, 444 U.S. 1014 (1980); *Usery v. Edward J. Meyer Memorial Hosp.*, 428 F. Supp. 1368, 1370 (W.D.N.Y. 1977). *See also State of Tenn. v. Louisville & N.R. Co.*, 478 F. Supp. 199, 206 (M.D. Tenn. 1979).

Even if the plurality did not adopt such a balancing approach, Justice Blackmun's test remains of crucial importance, for without his concurrence the federal regulation in *National League of Cities* would have been upheld. Accordingly, in cases since *National League of Cities* several circuits, including this one, have examined the federal interest in regulating the area in addition to determining whether the activity qualifies as an integral governmental function. *See Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 99 n.21 (3rd Cir. 1979) (en banc), *cert. granted in part*, ____ U.S. ____, 100 S.Ct. 2984 (1980); *Peel v. Florida Dept. of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979); *In re Special April 1977 Grand Jury*, 581 F.2d 589, 592 (7th Cir.) (per curiam), *cert. denied sub nom. Scott v. United States*, 439 U.S. 1046 (1978); *United States v. Best*, 573 F.2d 1095, 1102 (9th Cir. 1978); *Friends of the Earth v. Carey*, 552 F.2d 25, 37-38 (2d Cir.), *cert. denied* 434 U.S. 902 (1977).

The inquiry is therefore essentially two-tiered. To determine whether MTA's operation of the LIRR falls within the sphere of protected state activity, we must first consider whether the operation of the railroad qualifies as an integral or traditional government function. It it does, the federal interest in regulating

the collective bargaining relations of LIRR employees under the Railway Labor Act must be weighed against the State's interest in applying the Taylor Law.

A. *Integral Government Function*

In *National League of Cities v. Usery*, the plurality attached various labels to the activities it sought to protect, referring to "functions essential to separate and independent existence," 426 U.S. at 845, "integral governmental functions," *id.* at 851, and "traditional governmental functions." *Id.* at 852. The tenor of the opinion, however, is that the States must retain the power to make certain choices and decisions in connection with their role as provider of certain public services.[15] The making of these choices and structuring of operations will be termed "essential governmental decisions." 426 U.S. at 850. The types of public services that are singled out for protection will be called "integral governmental functions." *Id.* at 855.[16]

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15 In this regard, the term "sovereignty" as used in the opinion has been defined to mean "the state's role of providing for the interests of its citizens in receiving important social services." Michelman, *States' Rights and States' Roles: Permutations of Sovereignty in* National League of Cities v. Usery, 86 Yale L.J. 1165, 1172 (1977). *See* Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065, 1074, 1076-77 n.42 (1977).

16 The plurality used the term "integral" in at least five places in *National League of Cities*, 426 U.S. at 851, 852, 854 n.18, 855 (twice). At one point the plurality states that the "challenged amendments operate to directly displace the State's freedom to structure 'integral operations' in areas of traditional government functions." *Id.* at 852. At other places, the phrase "integral" appears to have roughly the same meaning as "traditional." Michelman, *supra*, at 1172. While the phrase "integral government services" rather than "integral governmental function" might better indicate the focus on the public service provided, for the sake of consistency we chose to use the Supreme Court's phrase.

There is no question but that, as in *National League of Cities*, the operation of the federal statute directly displaces the State's ability to structure its employee-employer relationships and to make essential governmental decisions. *See* 426 U.S. at 851. In enacting the Taylor Law, New York State made a determination that in order to protect the public it must assure the orderly and uninterrupted operations and functions of government by prohibiting strikes by public employees. N.Y. Civ. Serv. Law § 200.[17] Enactment of the Taylor Act was prompted in large part by the transit strike which crippled New York City in 1966.[18] By precluding the State from enforcing this legislation, including its no-strike provision, the Railway Labor Act eliminates a key provision in the State's legislative effort to provide its citizens with continuous public transportation. This was graphically illustrated by the LIRR's week long walk-out in December and its two-day strike at the time

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17 N.Y. Civ. Serv. Law § 200 provides:

> The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized, (c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes, (d) creating a public employment relations board to assist in resolving disputes between public employees and public employers, and (e) continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition.

18 New York Times, January 16, 1966, at 1, col. 1.

of the recent strike by New York City bus and subway workers. Moreover, the freedom to strike affects the collective bargaining process and could result in requiring the State to pay higher wages in order to avert the devastating economic injury that a halt in the commuter transportation system would cause.[19] Thus the inability to prohibit public employee strikes and its possible economic effect deprives the States of the right to make the "fundamental employment decisions" that are essential to their "separate and independent existence." *Id.* at 851.

Having found that the RLA operates to displace "essential governmental decisions," it is next necessary to determine whether those decisions affect the operations of "integral governmental functions." In this regard, it seems beyond question that the LIRR is an important public service. That the State's operation of the LIRR therefore qualifies as a protected state activity, however, is not as readily resolved.

In *United States v. California*, 297 U.S. 175 (1936), the Supreme Court found that provisions of the Federal Safety Act were applicable to the State Belt Railroad, notwithstanding the fact that the railroad was owned by the State of California. Forty years later, in *National League of Cities v. Usery, supra*, the Court again addressed the subject of a state-owned railroad, stating in dictum:

> The holding of *United States v. California* . . . is quite consistent with our holding today. There California's activity to which the congressional

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19 The 11-day transit strike in April cost New York City an estimated $1.1 billion, and businesses lost an estimated $100 million daily. Cirrillo, *New Yorkers Ride Again*, Associated Press, April 12, 1980.

> command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce . . . ." 297 U.S., at 182.

*National League of Cities v. Usery*, 426 U.S. at 854 n.18. Mr. Justice Brennan noted in his *National League of Cities* dissent that, although the plurality distinguished *United States v. California*, its logic would overrule the earlier decision. 426 U.S. at 871. Commentators also have questioned the rationality of excluding railroads from the protected core of governmental functions, particularly the closer these railroads come to resembling commuter lines. *See, e.g.*, Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 Yale L. J. 1165, 1172 n.28 (1977).

We find that *United States v. California* does not dictate the result here. The plurality's definition of state sovereignty in *National League of Cities* suggests that "the terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times." *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979). Obviously, the catalog of essential state-provided services is not and cannot be static. As Mr. Justice Douglas observed in *New York v. United States*, 326 U.S. 572, 591 (1946) (Douglas J., dissenting), "[w]hat might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable."

In view of the foregoing, *United States v. California* is distinguishable from the case at bar. The State Belt

Railroad, although operated intrastate as a "public function and without profit," was solely a freight service, the proceeds from which were used for harbor improvements. 297 U.S. at 183. The LIRR, on the other hand, as a provider of passenger transportation in a metropolitan area, furnishes a very important public service which has come to be supplied primarily by state and local governments.[20]

Aside from the fact that local passenger transportation is now of necessity provided almost exclusively by state and local governments, the service is essential to the public and inures to its benefit much more directly than did that provided by the California Belt Railroad. Without the LIRR, commuters would find it difficult or impossible to get to their jobs, and the reduced influx of people into New York City would have a significant impact upon the economy of the city and the State.[21] The absence of passenger rail service to and from Long Island would have a severe environmental impact.[22]

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20 Consider, for example, the Chicago Transit Authority, Massachusetts Transit Authority, San Francisco's Bay Area Rapid Transit. In addition, Miami is constructing a system that will connect the city with the suburbs, New York Times, Mar. 9, 1978, at 18, col. 1, and Atlanta has opened portions of its new rapid transit system. New York Times, July 1, 1979, at 16, col. 1.

21 See note 18, *supra*.

22 For example William J. Ronan, then Chairman of the New York State Metropolitan Commuter Transit Authority, testified during the Senate hearings in 1970 that "if the Long Island Railroad went out of existence tomorrow, it would take a minimum number of 26 lanes of expressway from Long Island in one direction, and 26 coming out of the city, to handle the traffic currently handled by the Long Island Railroad." *Effect of Railroad Mergers on Commuter Transportation: Hearings before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 1138 (hereinafter "Hearings"). He added that ten blocks in the center of New York City would have to be set aside solely for parking. *Id.*

Moreover, we cannot be blind to the sweep of world wide events which by all indications is forcing substantial alteration of our former profligate transportation practices and undeniably will create reliance on public mass transit.

In sum, there are two grounds for finding the State's operation of a passenger rail service, as distinguished from a freight service, to be an "integral governmental function." First, it is a service that the state and local governments are particularly suited to provide because of the community-wide need—and it is a service they have come to provide by a process of economic elimination of private suppliers. *See Amersbach v. City of Cleveland*, 598 F.2d at 1037. Although this is a relatively new development, there now is no reasoned basis for finding that the operation of an intrastate passenger service which transports tens of thousands to and from their jobs every day is any less a governmental function than are sanitation or public parks and recreation. *See National League of Cities v. Usery*, 426 U.S. at 851.

Second, there is little doubt that the LIRR's passenger service is of much more importance to the public, in several respects, than was the state-operated freight line in *United States v. California, supra.*

There is some question, however, as to the current validity of focusing on the importance of a public service when defining what constitutes an "integral governmental function." Historically, the Supreme Court has recognized that the range of arguably essential public services that could be provided by local government is potentially limitless, and has thus shied away from "public function" analysis. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53

(1974) (rejecting "essential public service" test for determining what constitutes state action).[23] *See generally Amalgamated Ass'n of Street, Elec. Railway & Motor Coach Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383, 397-98 (1951) (public importance of gas and transit service to community irrelevant in light of congressional intent to permit strikes under NLRA).

More recently, in *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the Court again declined the opportunity to engage in "public service" analysis. In holding that municipalities are not automatically exempt from federal antitrust laws, the plurality avoided an "integral function" test altogether. Instead of focusing on the type of service involved—a municipally owned electric utility—the plurality stated that the city's anticompetitive practices would be immune from antitrust regulation only if authorized or contemplated by a legislative mandate from the State. *Id.* at 415.

In a concurring opinion, Chief Justice Burger relied on the fact that the utility was a proprietary enterprise, noting that the operation of a business enterprise is not "an integral operation in the area of traditional

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[23] In *Jackson v. Metropolitan Edison Co.*, *supra*, the Court also rejected an "affected with the public interest" analysis, quoting from *Nebbia v. New York*, 291 U.S. 502, 536 (1934):

> It is clear that there is no closed class or category of businesses affected with a public interest. . . . The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test . . . .

government functions." 435 U.S. at 423-24. He stressed that *National League of Cities'* definition of sovereignty is whether the State's interest involved "functions essential to separate and independent existence," *id.* at 423, and indicated that the state-owned railroad in *United States v. California* did not meet that definition even though it was operated "without profit, and as a 'public function.'" *Id.* at 422 n.4.

The impact of *Lafayette* on *National League of Cities* must be considered.[24] We believe that *Lafayette* may be limited to its antitrust context; indeed, the plurality noted a "presumption against implied exclusions from coverage of the antitrust laws." 435 U.S. at 399.[25] Moreover, while *Lafayette* involved an enterprise which is undoubtedly as important a public service as the operation of a local passenger railroad line, both the plurality and Chief Justice Burger's concurring opinions noted that the City of Lafayette competed with private utilities for customers in the area. *See* 435 U.S. at 391 n.3, 403-08, 422 n.3. Indeed, Chief Justice Burger stated that he used "the term 'proprietary' only to focus attention on the fact that all of the parties are

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24 See *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 430 (Stewart, J., dissenting) ("The plurality does not advance any basis for its disregard of National League of Cities . . . ."); Comment, National League of Cities *and the* Parker *Doctrine: The Status of State Sovereignty under the Commerce Clause*, 8 Fordham Urb. L.J. 301 (1980).

25 The Sixth Circuit, in considering the applicability of the Fair Labor Standards Act to city employees assigned to duties at the municipally owned airport, paid little attention to *Lafayette*. *Amersbach v. Cleveland*, 598 F.2d at 1036-38. The Third Circuit, however, in *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 99 n.21 (1979), noted that the "*Lafayette* Court paid scant attention to *National League of Cities*, thus suggesting that even under the commerce clause federal statutes may be enforced against the states."

in a competitive relationship such that each should be constrained, when necessary, by the federal antitrust laws." 435 U.S. at 422 n.3. The existence of competition demonstrates that the public was not completely dependent on the municipality for the service and that it was economically feasible for private entities to provide it.

In contrast, had the MTA not taken over the operations of the LIRR in 1966, there probably would be no LIRR today. The substantial state and local funds used to subsidize the railroad attest to the fact that no private businessman would dare undertake the venture.[26] In short, not only is that particular activity essential to the public, but it is also essential that the government step in to furnish it.[27] *See Amersbach v. City of Cleveland*, 598 F.2d at 1037-38 ("[e]xperience has demonstrated that airports must be maintained by municipal corporations or other units of government").

Finally, the consistency of the result in *Lafayette* with the one conclusion we reach herein is further buttressed by the historical/empirical concept of state sovereignty implied in *National League of Cities* and alluded to above. In the words of one commentator, "As the problems faced by urban governments evolve, so will the citizenry's expectations of what are appropriate governmental services. Just as hospitals went from

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26 The federal government has also poured large amounts of money into the improvement of the LIRR (app. at 8 and 410). This fact does not affect the state immunity determination, however, as demonstrated by the fact that schools, hospitals and law enforcement all receive federal aid, but are considered integral state governmental functions. *See* 426 U.S. at 878.

27 New York State's purchase of the LIRR was premised on its finding that private enterprise would be unable to continue to own and operate the facility. *Hearings*, *supra*, at 134.

being accountable under federal regulations to a status of immunity, electric utilities may someday, in certain regions, provide an integral governmental function." Comment, National League of Cities *and the Parker Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 Fordham Urb.L.J. 301, 332 (1980). (footnotes omitted) Stated differently, we conclude that essentiality is gauged not only in terms of the nature of a public service, but also its availability in the marketplace.

B. *Federal vs. State Interests*

This fluid concept of sovereignty contains the potential for devastating impact, and accordingly, has engendered some criticism. *E.g.*, Michelman, *supra*, 86 Yale L.J. at 1193; Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereignty Redivivus*, 46 Fordham L. Rev. 1115, 1134 (1977-78). However, fears that *National League of Cities* will spur a new era of separatism are dispelled somewhat by adherence to Justice Blackmun's balancing approach, which suggests that a "demonstrably greater" federal interest should override a state's claim to immunity even in an area found to involve an integral government function. 426 U.S. at 856.

This court has stated that:

> [i]n determining whether an otherwise valid exercise of the federal commerce power would impermissibly impair state sovereignty we [are] required to balance the reason for the exercise against the extent of usurpation of state policy-making or invasion of integral state functions that would result, giving "appropriate recognition to the

> legitimate concerns of each government." (citation omitted)

*Friends of the Earth v. Carey*, 552 F.2d at 37. In this case, it is not possible to say that after weighing the usurpation of state policy-making and the invasion of integral state functions against the reason for the exercise of the federal commerce power, that the federal interest is "demonstrably greater."

First, the objectives of the RLA are consistent with those of the Taylor Law: to provide an orderly method of dispute resolution and to ensure continuous service.[28] Congress stated the purpose of the RLA under section 2 as follows:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this [Act]; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

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[28] *See* note 17, *supra*.

45 U.S.C. § 151a. Avoiding interruption of commerce was deemed a "primary purpose" of the RLA by the Court in *California v. Taylor*, 353 U.S. 553, 566 (1957). The Taylor Law's prohibition against strikes seeks to further that purpose, thereby helping the LIRR to maintain its status as a "vital link" in the flow of interstate commerce. Moreover, while the state law preempted in *California v. Taylor* was the "antithesis" of the federal scheme, since it placed an absolute prohibition on the railroad employees' right to bargain collectively, *id.* at 559-60, the state law involved here preserves the right of independent collective bargaining in several respects. *See SIRTOA v. International Bhd. of Electrical Workers*, 57 A.D.2d 614, 393 N.Y.S.2d 773, 775-76 (2d Dept.), *cert. denied*, 434 U.S. 934 (1977).

Second, from a purely practical viewpoint, the State has a far greater interest in dispute resolution relating to the LIRR than does the federal government. While the federal government has the prevailing interest in the operation of the LIRR's freight service, the State and its municipalities have a vital, predominant interest in the continuous operation of its commuter-passenger service. In this case, the revenue from the purely intrastate passenger service was over 80% of the total revenue, and the number of trains allocated to that service was significantly greater than the number of cars on the freight line.

In sum, we recognize that the LIRR would come under the literal terms of the RLA, see *California v. Taylor, supra*, and that the right to strike, free from state interference, has been held essential to that federal scheme, *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-82 (1969). In the

present context, however, the federal interest in preserving the right of LIRR employees is not "demonstrably greater" than New York State's interest in preventing LIRR strikes in order to ensure continuous passenger service for so many daily commuters. We reach this result with the realization that the determination of whether state or federal interests are paramount may be difficult to resolve in future cases. However, that difficulty cannot preclude a conclusion required by the present circumstances and authorities.

Again, we are, as we must be, guided by *National League of Cities'* ground-breaking holding that:

> States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. . . . Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. 426 U.S. at 854-55.

Since the rationale of *National League of Cities* requires reversal here, it is not necessary to determine whether the district court improperly enjoined the LIRR and MTA from prosecuting the state court action.

## APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of December, one thousand nine hundred and eighty.

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No. 80-7199

UNITED TRANSPORTATION UNION, *Plaintiff-Appellee,*

v.

LONG ISLAND RAIL ROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY
OF NEW YORK, *Defendants-Appellants.*

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(Filed December 17, 1980)

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, United Transportation Union,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
*Clerk*

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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79 C 3118

UNITED TRANSPORTATION UNION, *Plaintiff,*

-against-

LONG ISLAND RAIL ROAD and METROPOLITAN TRANSPORTATION ASSOCIATION, *Defendants.*

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**Memorandum Of Decision**

(March 5, 1980)

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Appearances:

For the Plaintiff United Transportation Union, and *amicus curiae* Brotherhood of Locomotive Engineers, Railroad Yard Masters of America, Brotherhood of Railway Signalmen, Brotherhood of Railway Carmen, International Association of Machinists, and Brotherhood of Railroad and Airline Clerks:

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MISHLER, CH. J.

This action arises within the context of a labor controversy between those employees of the Long Island Rail Road (the "Railroad") whose exclusive bargaining representative is the United Transportation Union (the "UTU"), and the Railroad and its parent agency, the Metropolitan Transportation Authority (the "MTA"). On December 6, 1979, as the parties were on the verge of exhausting the collective bargaining procedures mandated by the Railway Labor Act, 45 U.S.C. §§151 *et seq.*, (the "Act"), the UTU filed this suit seeking: (a) a declaratory judgment that the relationship between the parties was governed by the Act and that the employees could thus not be subjected to the sanctions of Sections 200 to 214 of the New York Civil Service Law (the "Taylor Law") in the event they engaged in the "self-help" authorized by the Act; and (b) injunctive relief to protect those rights of the employees guaranteed by the Act, including an injunction against the commencement or prosecution of a state court action seeking to invoke the Taylor Law. On December 8, 1979 the UTU employees went on strike. On December 14, 1979, President Carter established an Emergency Board pursuant to section 10 of the Act, 45 U.S.C. §160, and the employees returned to

work. The "cooling off" period triggered by the Presidential action was to expire on February 14, 1980.

On January 17, 1980 the defendants took their first action in this suit, filing a motion to dismiss in which they claimed that no justiciable case or controversy existed since they did not believe that the Taylor Law could be invoked against the UTU's members and thus had no intent of invoking its sanctions. According to the defendants, while the Railroad was a subsidiary corporation of the MTA, it was not a "public benefit subsidiary corporation," and thus, as a matter of state law, its employees were not "public employees" subject to the Taylor Law. *See* N. Y. Public Authorities Law §1265(9)(a); N. Y. Civil Service Law §201(7)(A).

On February 8th, however, before the motion to dismiss could be heard, the defendants changed their posture completely by converting the Railroad from a private stock corporation to a public benefit corporation whose employees would be facially subject to the Taylor Law. On February 12th, the UTU responded by moving for a temporary restraining order and injunctive relief preliminarily restraining the defendants from commencing a state court action grounded on the Taylor Law to enjoin a strike by the UTU's members. The undersigned denied the motion on the record. At that time, because the parties appeared to agree that all pertinent facts were a matter of record, the court suggested that they expeditiously attempt to arrive at an agreed statement of facts so that the case might be speedily decided. The suggestion, however, was not followed.

Instead, on February 13th — two days before the expiration of the "cooling-off" period — the Railroad, by order to show cause, commenced suit against the UTU and other unions in Supreme Court, New York County, seeking an injunction under the Taylor Law against the impending strike. *The Long Island Rail Road Co.* v. *United Transportation Union, et al.*, No. 40327/80 (Sup. Ct. N.Y. Co.). Justice Peggy Bernheim issued a temporary restraining order and set down a hearing on the Railroad's motion for a preliminary in-

junction for February 15th. On February 14th, the unions removed that action to the United States District Court for the Southern District of New York, and moved to have the action transferred to this court and consolidated with the instant action. *The Long Island Rail Road Co.* v. *United Transportation Union, et al.*, No. 80 Civ 0914 (S.D.N.Y.). The Railroad moved to remand the state action. With the consent of the parties, the temporary injunction against the strike was continued while Chief Judge MacMahon considered the motions.

On February 21st, the defendants filed their answer in the instant action. As is pertinent here, paragraph four of the answer admits the allegation in paragraph four of the complaint that the Railroad "interchanges freight with railroads engaged in interstate commerce."[1] However, it denies the remaining allegations of that paragraph, including the averments that the Railroad "is a Class I railroad engaged in business as a common carrier for hire in the transportation of passengers and property in interstate and foreign commerce . . . and is a 'carrier' within the meaning of that term as defined in the Railway Labor Act." The answer further affirmatively alleges that the Railroad is a public benefit corporation engaged "essentially [in] intrastate commuter service" (¶ 18) and that its employees are governed by the Taylor Law rather than the Act.

On February 25th, Chief Judge MacMahon, in a written opinion, granted the Railroad's motion to remand the action before him to the state court. On February 27th, the unions moved before Justice Sidney Leviss in Supreme Court, Queens County, to transfer the state action from New York County to Queens. Justice Leviss continued the temporary restraining order against the union's threatened strike and directed that

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[1] Defendants sought to file an amended answer on March 4, 1980, the day that the parties appeared to argue plaintiff's motion for summary judgment. As is pertinent here, the proposed amended answer is substantially identical to the one orginally filed.

the Railroad refrain from seeking a preliminary injunction in New York County pending his decision on the venue motion.[2]

Finally, on February 28th, the plaintiff in the instant action sought and obtained from the undersigned an order to show cause bringing on the summary judgment motion which is the subject of this opinion. Argument was heard on March 4th.[3] At the conclusion of the argument the court granted the relief which we will outline below and advised the parties that this written opinion would be issued shortly. A copy of the judgment which was entered on March 4th pursuant to the court's oral opinion is appended hereto.

**The Issues**

There are three major issues confronting us:

(1) Is the Railroad a "carrier" subject to the Act;

(2) If so, does the Act preempt the application of the Taylor Law to the Railroad's employees;

(3) If the Taylor Law may not be applied to bar a strike by the plaintiff's members, what is the appropriate relief.

**Discussion**

A. As the defendants conceded both at the February 12th oral argument on plaintiff's motion for a preliminary injunction and at argument on the instant motion, the only major issue which requires a factual finding is the first of those we itemized, *i.e.*, whether the Railroad is a "carrier" within the meaning of the Act, 45 U.S.C. §1. More specifically, the defendants contend that a factual issue exists as to whether the Railroad is engaged in or has a sufficient impact on in-

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[2] Justice Leviss denied the motion on March 3, 1980.

[3] At that time, the defendants moved to dismiss the action on the ground that the plaintiff had failed to join as an indispensable party the New York State Attorney General. Fed.R.Civ.P. 19. They also moved to stay the instant action pending the outcome of the State proceedings. The court denied both motions from the bench.

terstate transportation to fall within the Act's regulatory scheme. The existence of this question of fact they assert, precludes the grant of summary judgment. We disagree.

The court's function on a motion for summary judgment is to determine whether any material factual issues are in dispute. *Adices* v. *S. H. Kress & Co.*, 398 U.S. 144, 159, 90 S. Ct. 1598, 1609 (1970). The burden is on the moving party to establish that the material facts are either conceded, undisputed, or beyond dispute. *See Heyman* v. *Commerce & Industry Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975). And, "the mere possibility that a factual dispute *may* exist, without more, is not sufficient to overcome a convincing presentation by the moving party." *Quinn* v. *Syracuse Model Neighborhood Corp.*, No. 79-7561, slip op. at 835 (2d Cir. January 8, 1980) (emphasis in original). The plaintiff has made such a convincing demonstration here.

The plaintiff has submitted documentation clearly establishing that the Railroad is the only common carrier by rail serving the numerous industries and traveling public in the Counties of Nassau and Suffolk. It has submitted reports filed by the Railroad with the ICC indicating that the Railroad's revenues from its freight operations exceeded $18 million in the year ending December 31, 1978. These revenues were obtained as a result of providing freight service to numerous Long Island concerns, such as aircraft manufacturers, supermarket chains, building suppliers, food processors, and farms. Furthermore, while the Railroad's own physical operations are located solely within New York State, its freight service supplies a critical link in the transportation of goods both to and from points throughout the continental United States and Canada. This is clearly evidenced by the fact that the Railroad interchanges freight with more than a dozen other railroads which are interstate carriers. According to the plaintiff, the Railroad presently handles approximately 1,000 freight cars per week to consignors and consignees over its tracks.

The defendants, in response, do not seriously dispute most of these factual allegations. Indeed, they admit that the

Railroad does interchange freight with other carriers going in and out of New York State. They argue, however, that the Railroad's freight revenues and operations are miniscule when compared to the scale of its intrastate commuter operations, and that as such, it should not be considered an interstate carrier. We reject this contention.

According to the defendants' own affidavits, the Railroad's revenues from freight operations in 1979 were, at a minimum, in excess of $12.1 million. Affidavit of James B. Huff, Controller of Metropolitan Transportation Authority, ¶ 9. These affidavits also contain claims that in 1978 the Railroad operated over 4,400 freight train trips, involving approximately 41,000 freight cars, or 800 cars per week. While these figures are slightly lower than those submitted by the plaintiff, the differences are not material for our present purposes. Nor, in the face of these figures do we find material the fact that the Railroad's freight revenues have decreased steadily over the years and that they now provide a small fraction of the Railroad's total income. Indeed, these figures, rather than undermining the plaintiff's characterization of the Railroad as an entity affecting interstate commerce, provide substantial support for the conclusion that the Railroad "is a necessary physical link with other railroads in the movement of a heavy volume of interstate rail freight via the New York City gateway between Long Island and other parts of the United States." *Long Island R.R. Co.* v. *Brotherhood of R.R. Trainmen,* 185 F. Supp. 356, 357 (E.D.N.Y. 1960). In short, were we to consider nothing more than the defendants' own papers we would be compelled to conclude that the Railroad is engaged in "interstate transportation," and thus subject to the Act. *State* v. *Taylor,* 353 U.S. 553, 561, 77 S. Ct. 1037, 1042 (1957). *See United States* v. *Union Stock Yard & Transportation Co.,* 226 U.S. 286, 304, 33 S. Ct. 83, 88 (1912) ("That the service is performed wholly in one state can make no difference if it is a part of interstate carriage.").

We note, however, that in addition, the Railroad has historically considered itself as a "carrier" within the meaning

of the Act, the Interstate Commerce Act, 49 U.S.C. §§1 *et seq.*, and related statutes. Thus, it has consistently filed reports required by the Interstate Commerce Act with the ICC. In addition, its employees have consistently received the benefits of the Railroad Retirement Act, the Railroad Unemployment Insurance Act, and the Federal Employees Liability Act. Moreover, in the dispute which lies at the heart of this action, the Railroad has affirmatively sought to invoke the collective bargaining and mediation procedures set out in the Act, including the establishment of a Presidential Emergency Board. We do not believe that the Railroad can now unilaterally change its essential character within this context by the simple expedient of reorganizing its corporate structure under state law.

Finally, we think it relevant to point out that both the Emergency Board convened in this dispute, and the ICC in a recent decision dealing with another subsidiary of the MTA, *Brotherhood of Locomotive Engeneers* v. *Staten Island Rapid Transit Operating Auth.*, Finance Docket No. 29011 (Nov. 8, 1979), stated that the Railroad is a carrier subject to the Act.

Against this background we are convinced that no fact question exists as to the interstate character of the Railroad's operations. We find that the Railroad is a carrier within the meaning of the Act.

B. Having found that the Railroad is a carrier within the meaning of the Act we must next determine whether its employees are free to resort to the self-help permitted by the Act or are subject to the prohibition and penalties of the Taylor Law. Resolution of this issue turns upon whether the federal scheme established by the Act preempts the state from regulating the strike activities of the Railroad's employees. We believe that it does.

While the issue is of extreme importance, we do not think that it would serve any useful purpose to embark on a lengthy discussion of the relationship between the pertinent federal and state legislation. We have only recently dealt with the

identical issue in a remarkably analogous context. In *Brotherhood of Locomotive Engineers* v. *Staten Island Rapid Transit Operating Authority*, No. 78 C 2083 (E.D.N.Y. February 9, 1979), we were asked to decide whether the Taylor Law could be applied to employees of another MTA subsidiary, the Staten Island Rapid Transit Operating Authority ("SIRTOA"). We held that if SIRTOA was subject to the Act its employees were free to engage in strike activities notwithstanding the fact that SIRTOA was a public benefit corporation whose employees were therefore subject to the Taylor Law's proscription of such conduct.

In reaching this result we held first that as a general matter, under the Supreme Court's holding in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 89 S. Ct. 1109 (1969), employees covered by the Act could not be prevented by the state from exercising their federally protected right to strike upon exhaustion of the Act's mandatory bargaining and mediation procedures notwithstanding the fact that a strike might result in substantial inconvenience or hardship to the public:

> [T]he exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes. The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission would be seriously affected by the knowledge that after the procedures were exhausted a State would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike.
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> * * *
>
> Whether the source of this right be found in a particular provision of the Railway Labor Act or in the scheme as a whole, it is integral to the Act. State courts may not enjoin a peaceful strike by covered railway employees, no

> matter how economically harmful the consequences may be.

*Id.* at 380-85, 89 S. Ct. at 1116-19.

We then held that under *State of California* v. *Taylor, supra,* 353 U.S. at 563-65, 77 S. Ct. at 1043-44, the right to strike was not impaired by the fact that the employer was a state agency:

> Congress apparently did not discuss the applicability of the Railway Labor Act to a state-owned railroad. [However,] [t]he fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. . . .When Congress wished to exclude state employees [from coverage under federal labor legislation] it expressly so provided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees.

*See also Parden* v. *Terminal Railway,* 377 U.S. 184, 84 S. Ct. 1207 (1964); *International Longshoremen's Assoc.* v. *North Carolina State Ports Auth.*, 463 F.2d 1 (4th Cir.), *cert. denied,* 409 U.S. 982, 93 S. Ct. 318 (1972).[4]

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[4] SIRTOA also contended, as the defendants do here, that to subject it to the Act's regulatory scheme would be inconsistent with the Supreme Court's holding in *National League of Cities* v. *Usery,* 426 U.S. 833, 96 S. Ct. 2465 (1976), that the Tenth Amendment prohibits Congress from legislating in a manner which operates to directly displace the States' freedom to structure integral operations in areas of traditional governmental function. . . . " *Id.* at 852, 96 S. Ct. at 2474. We rejected this contention as

> inconsistent with the Court's own language in *Usery* which specifically held that the operation of a railroad in interstate commerce is not an integral part of governmental activity and further held that its earlier decisions in *United States* v. *California,* [297 U.S. 175, 56 S. Ct. 421 (1936)], and *California* v. *Taylor,* [353 U.S. 553 77 S. Ct. 1037 (1957)], were not undermined by *Usery. Id.* at 854-55 n. 18, 96 S. Ct. at 2475 n. 18. We believe that SIRTOA's operation, even if characterized as a commuter rail service is not akin to such state activities as "fire prevention, police protection, sanitation public health, and parks and recreation [which] are typical of those

Next, we held in *SIRTOA* that the tangential relationship between the carrier's activities and interstate commerce did not justify application of the Taylor Law. We noted that there was no legal basis for balancing the local interest against the federal interest in determining whether the Act of the state's legislation applied. "Not a single authority has been cited to this court which even suggests that we should engage in a quantitative analysis, debilitating the Act in some proportionate measure as the connection with interstate commerce decreases." Slip op. at 25.

Finally, we concluded that "New York State may not validly apply its Taylor Law to the employees of SIRTOA. Such abridgement of the right to strike, even when the affected employees are public servents, is a direct assault upon the heart of the federal scheme of labor relations in the railway industry. Under the Supremacy Clause of our Constitution, it is unquestionable that the federal scheme predominates." Slip op. at 26.

What this court said in *SIRTOA* applies with equal force in the present case. We find that employees of the Railroad, who have exhausted the mandatory bargaining and mediation procedures outlined in the Act, have a federally guaranteed right to strike.

C. From the foregoing, we think it clear that the plaintiff is entitled to a declaratory judgment that its members have the right to engage in self-help under the provisions of the Act and that the Taylor Law may not be invoked in derogation of this right. Moreover, we believe that the plaintiff is also entitled to a permanent injunction restraining the defendants from further prosecuting the state court action based on the Taylor

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performed by state and local governments in discharging their dual functions of administering public law and furnishing public services." *Id* at 851, 96 S. Ct. at 2474.

Slip op. at 24-25.

We see no reason why a different conclusion should be reached in the instant case.

Law. While we reach this latter conclusion with some hesitation we believe that the particular circumstances before us warrant the grant of such relief.

It is of course well-established that a federal court may enjoin a pending state court proceeding only where such an injunction is specifically permitted under one of the express exceptions to the Anti-Injunction Act, 28 U.S.C. §2283.[1] *See e.g., Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 630, 97 S. Ct. 2881, 2887 (1977). It is clear, however, from the very language of §2283 that a federal court has the authority to issue an injunction "to protect or effectuate its judgments."

Thus, the courts have held that an injunction may properly issue for the purpose of preventing relitigation in the state court of a matter which has been finally determined by a judgment in the federal forum. *See, e.g., Mitchum* v. *Foster*, 407 U.S. 225, 235-36, 92 S. Ct. 2151, 2158-59 (1972); *Samuel C. Ennis & Co., Inc.* v. *Woodmar*, 542 F.2d 45, 49 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096, 97 S. Ct. 1112 (1977); *International Assoc. of Machinists* v. *Nix*, 512 F.2d 125, 130 (5th Cir. 1975); *Donelon* v. *New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855, 94 S. Ct. 157 (1973); *Complaint of Cosmopolitan Shipping Co., S.A.*, 453 F.Supp. 268 (S.D.N.Y. 1978); *Walter E. Heller & Co., Inc.* v. *Cox*, 379 F.Supp. 299 (S.D.N.Y. 1974). The rationale for permitting injunctions in such instances was stated by the

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[1] We note that there is at least some question as to whether §2283 is at all applicable to the issue before us since the complaint in this action was filed prior to the commencement of the state court proceedings and prayed for an injunction against their institution. *See Dombrowski* v. *Pfister*, 380 U.S. 479, 484 n. 2, 85 S. Ct. 1116, 1119 n. 2 (1965). However, because state proceedings are presently pending, we assume that §2283 does apply. In any event, since we believe that an injunction is authorized under one of the express exceptions to the statute, our analysis of the propriety of issuing such an injunction is identical to that we would engage in if the statute did not come into play.

Fifth Circuit in *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F.2d 1286, 1312 (5th Cir. 1971), *cert. denied* 404 U.S. 1047, 92 S. Ct. 701 (1972): "This [exception to §2283] is a sensible solution to the problem of relitigation of federal decisions. It prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review."

Other cases have sustained the propriety of issuing an injunction against state court proceedings under the "protect or effectuate" exception to §2283 where the state court action, while not involving matters identical to those litigated in the federal court, nonetheless threaten to nullify the vitality of the federal judgment. *See e.g., United Industrial Workers of the Seafarers Int'l. Union* v. *Board of Trustees of Galveston Wharves,* 400 F.2d 320 (5th Cir. 1968), *cert. denied,* 395 U.S. 905, 89 S. Ct. 1747 (1969); *N.L.R.B.* v. *Schertzer,* 360 F.2d 152 (2d Cir. 1966); *Sperry Rand Corp.* v. *Bothlein,* 288 F.2d 245 (2d Cir. 1961). Thus, we think it clear that §2283 does not present an absolute bar to our issuing an injunction that is necessary to assure that our declaratory relief will be effective.

However, the fact that a federal court has the *power* to enjoin state proceedings in order to protect its own judgment does not mean that it is appropriate to exercise that authority in every instance. Whether such an injunction should issue hinges upon consideration of a number of factors including "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum* v. *Foster, supra,* 407 U.S. at 243, 92 S. Ct. 2162. While we have found no case which directly addresses the precise issue before us, there are several cases which point to the propriety of injunctive relief in circumstances such as these. Thus, in *Donelon* v. *New Orleans Terminal Co., supra,* the Fifth Circuit Court of Appeals affirmed the district court's grant of an injunction against local officials prosecuting a state court action in which they sought

injunctive relief against allegedly unsafe practices of a railroad. The appellate court held that the injunction was properly issued by the district court in order to protect its own earlier final judgment holding that the railroad could not be subjected by local authorities to safety standards outside of the Federal Railroad Safety Act.

Even more analogous to the present situation is *United Industrial Workers of the Sea farers Int'l. Union* v. *Board of Trustees of Galveston Wharves, supra.* In that case a railroad carrier decided during the terms of the collective bargaining agreement with the plaintiff union to lease its facilities. This action would have resulted in the termination of its operation and its need for employees. The Union responded by requesting negotiation; when the carrier refused, it commenced a strike and picketing. The Union also commenced an action in federal district court seeking to enjoin the consummation of the carrier's lease agreement pending exhaustion of the Railway Labor Act's processes. The district court denied the requested relief and relegated the "minor dispute" to the Railroad Adjustment Board. On appeal, the circuit court reversed and held, *inter alia,* that because the dispute was a "major" one the carrier was required to negotiate in good faith with the Union. After further proceedings in the district court, a second appeal and remand, *see United Industrial Workers of Seafarers Int'l. Union* v. *Board of Trustees of Galveston Wharves*, 368 F.2d 412 (5th Cir. 1966), the district court ordered the Carrier to negotiate. It also enjoined the Carrier from "enforcing, giving continued effect to or availing [itself] in any manner whatsoever of the benefits of a state court injunction that [it had obtained] to enjoin the picketing by members of the Union." On appeal the Fifth Circuit Court of Appeals held that the injunction had been properly issued. The court found that the Union's picketing and strike were permitted under the federal act because the Carrier had refused to comply with its statutory duty to negotiate. Moreover, the court determined that "[t]he effect of the state court injunction against a possible Union strike [was] perhaps to

render impotent the duty to bargain imposed by [the] Court." 400 F.2d at 331. The court concluded that

> [t]he right to strike is adjunct to the Union's statutory rights and implicit in our [bargaining] order. This national labor policy cannot be frustrated by a state court injunction. *To effectuate* the *judgment of the federal court,* the district court properly enjoined the Carrier from availing itself of the state court injunction.

*Id.* at 334 (emphasis added).

Of course, these cases do not stand for the proposition that a federal district court may "enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even where the interference is unmistakably clear." *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 294, 90 S. Ct. 1739, 1747 (1970). However, these decisions do indicate that where a federal court has finally declared that a party does enjoy a protected right and the pending state judicial proceeding threatens to nullify the effect of the federal court's determination, an injunction may issue to prevent such a result. Moreover, we find support for this conclusion in the Supreme Court's decision in *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers, supra.* There, in 1967, a railroad applied to a federal district court for an injunction which would restrain a union from picketing. The district court denied the requested relief. The railroad then sought and obtained the identical relief in a state court. Sometime thereafter the Supreme Court decided in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra,* as we noted above, that railway employees covered by the Railway Labor Act had a federally guaranteed right to engage in self-help activity such as picketing. Apparently in response to this decision, the union returned to federal district court and obtained an injunction against the enforcement of the state court's restraining order.

The Supreme Court found that the district court's action was barred by §2283, rejecting *inter alia*, the union's contention that the injunction was necessary to "protect or effectuate" the district court's 1967 judgment which had denied the railroad's application for injunctive relief against the picketing. Significantly, however, the Court went to great lengths to find that the rationale of the 1967 decision was not the same as that subsequently announced in *Jacksonville Terminal*. Rather, it construed that earlier decision as having been based soley on the district court's belief that under the Norris-LaGuardia Act, 29 U.S.C. §101, it was without jurisdiction to grant the relief sought by the railroad. We think that a fair reading of both the majority and dissenting opinion in *Atlantic Coast Lines* leads to the conclusion that had the district court's earlier decision adjudicated the union's rights under the Railway Labor Act — as we have here — an injunction to protect that adjudication would have been found by the Court to have been appropriate.

Turning to the facts of the instant case, we think that they present compelling reasons why an injunction against the state court action is appropriate. First, by the defendants' own admission, the state court action presents the identical issues which we have fully adjudicated herein. Thus, because in this court's view our determination here would certainly preclude relitigation in the state forum under the doctrine of *res judicata*, we can see no purpose which the state court action would serve apart from casting doubt on the finality and force of this court's judgment. We also believe that this concern is particularly compelling where, as here, important federal rights implicating national labor policy are at stake. Moreover, in view of the fact that the Attorney General of New York has a statutory obligation to pursue the remedies set forth in the Taylor Law, *see* N.Y. Civil Service Law §211, an assault on these federal rights is a certainty absent an exercise of this court's injunctive powers.

Another consideration is the fact that the entire history of this litigation leads to the conclusion that the defendants

have sought to adjudicate this matter in the state court solely because they believe that a different result could be obtained in that forum. *See Staten Island Rapid Transit Operating Authority* v. *International Brotherhood of Electrical Workers*, 57 A.D. 2d 614 (2d Dep't.), *leave to appeal denied*, 42 N.Y.2d 804, *cert. denied*, 434 U.S. 934, 98 S. Ct. 421 (1977). While we are confident that the state court would give full effect to our determination, even the remote possibility of inconsistent judgments in an area of such great importance should be avoided if at all possible. Additionally, we think it important that the present action was commenced some two months prior to the action in state court. This is not a case where the federal plaintiffs have sought to preclude the orderly consideration and determination of an issue already pending before the state court. Rather, it has been the defendants who have sought to forum shop for a more sympathetic ear and who have endeavored to avoid determination of this federal issue in a federal court. Lastly, this court believes that the integrity of the collective bargaining scheme established by the Railway Labor Act requires a prompt and final determination that plaintiff's members have a guaranteed right to engage in self-help. The longer that this issue remains unresolved or that doubts continue to linger, the longer that the federal scheme for resolving railway labor disputes remains nugatory. It is for these reasons and out of no disrespect for the state court's integrity or ability that we take the drastic step of enjoining further state court action affecting the rights of this plaintiff.

Finally, however, because we believe that the issues involved are difficult ones whose resolution are clearly not free from doubt, we think that it would be appropriate to enjoin the plaintiff from engaging in any "self-help" pending the Second Circuit's review of our decision. Such an injunction is clearly necessary to preserve the status quo pending appeal. *See Chicago and North Western Railway Co.* v. *United Transportation Union*, 471 F.2d 366, 368 (7th Cir. 1972), *cert. denied*, 410 U.S. 917, 93 S. Ct. 965 (1973). Of course, if the

defendants do not prosecute their appeal expeditiously, we would consider vacating this injunction.

/s/ JACOB MISHLER
Jacob Mishler
*U.S.D.J.*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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79 C 3118

UNITED TRANSPORTATION UNION,
(EDWARD YULE, JR., Its General Chairman), *Plaintiff,*

-against-

LONG ISLAND RAIL ROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY OF NEW YORK, *Defendants.*

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**JUDGMENT**

March 4, 1980

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The Court having this day granted plaintiff's motion for summary judgment; it is

ORDERED, ADJUDGED, DECREED and DECLARED that the Long Island Railroad Company is a carrier within the meaning of the Interstate Commerce Act and the Railway Labor Act; that members of the United Transportation Union are subject to the limitations imposed upon them by the Railway Labor Act and entitled to the rights granted thereunder including the right of self-help upon the exhaustion of the mandatory provisions thereof; that New York Civil Service Law Sections 200 *et seq* (Taylor Law) infringe the rights granted under the Railway Labor Act and therefore are unenforceable as to members of United Transportation Union who are employed by the Long Island Railroad Company, and it is further

ORDERED, ADJUDGED and DECREED that defendants, their officers, agents, servants, employees and attorneys, and persons in active concert or participation with them shall not prosecute any proceeding or take any affirmative steps in any action now pending in any state court against United

Transportation Union based on an alleged violation of New York Civil Service Law Sections 200 *et seq* (Taylor Law) or institute any action against United Transportation Union in any state court based on alleged violation of said statute.

Pending determination of the appeal from the order and judgment entered herein, United Transportation Union, its officers, agents, servants, employees, and attorneys and persons acting in active concert or participation with them are enjoined and restrained from exercising the right of self-help and/or aiding, counselling or participating in any strike or strike action by any other labor organization against the Long Island Railroad Company.

Judgment entered accordingly this 4th day of March, 1980 at Brooklyn, New York.

/s/ RICHARD H. WEARE
Richard H. Weare,
*Clerk of Court*

*Approved:*

/s/ JACOB MISHLER
Jacob Mishler
*U.S.D.J.*

## APPENDIX D

**New York Taylor Law, New York Civil Service Law, §§210 And 211:**

### §210. Prohibition of strikes

1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

2. Violations and penalties; presumption; prohibition against consent to strike; determination; notice; probation; payroll deductions; objections; and restoration.

(a) Violations and penalties. A public employee shall violate this subdivision by engaging in a strike or violating paragraph (c) of this subdivision and shall be liable as provided in this subdivision pursuant to the procedures contained herein. In addition, any public employee who violates subdivision one of this section may be subject to removal or other disciplinary action provided by law for misconduct.

(b) Presumption. For purposes of this subdivision an employee who is absent from work without permission, or who abstains wholly or in part from the full performance of his duties in his normal manner without permission, on the date or dates when a strike occurs, shall be presumed to have engaged in such strike on such date or dates.

(c) Prohibition against consent to strike. No person exercising on behalf of any public employer any authority, supervision or direction over any public employee shall have the power to authorize, approve, condone or consent to a strike, or the engaging in a strike, by one or more public employees, and such person shall not authorize, approve, condone or consent to such strike or engagement.

(d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the chief executive officer of the government involved shall, on the

basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determination shall not be deemed to be final until the completion of the procedures provided for in this subdivision.

(e) Notice. The chief executive officer shall forthwith notify each employee that he has been found to have committed such violation and the date or dates thereof and of his right to object to such determination pursuant to paragraph (h) of this subdivision; he shall also notify the chief fiscal officer of the names of all such employees and of the total number of days, or part thereof, on which it has been determined that such violation occurred. Notice to each employee shall be by personal service or by certified mail to his last address filed by him with his employer.

[Paragraph (f) has been repealed.]

(g) Payroll deductions. Not earlier than thirty nor later than ninety days following the date of such determination, the chief fiscal officer of the government involved shall deduct from the compensation of each such public employee an amount equal to twice his daily rate of pay for each day or part thereof that it was determined that he had violated this subdivision; such rate of pay to be computed as of the time of such violation. In computing such deduction, credit shall be allowed for amounts already withheld from such employee's compensation on account of his absence from work or other withholding of services on such day or days. In computing the aforesaid thirty to ninety day period of time following the determination of a violation pursuant to subdivision (d) of paragraph two of this section and where the employee's annual compensation is paid over a period of time which is less than fifty-two weeks, that period of time between the last

day of the last payroll period of the employment term in which the violation occurred and the first day of the first payroll period of the next succeeding employment term shall be disregarded and not counted.

(h) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer (within twenty days of the date on which notice was served or mailed to him pursuant to paragraph (c) of this subdivision) his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall sustain the objection. If the chief executive officer shall determine that the affidavit and supporting proof fails to establish that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did not violate this subdivision, the chief executive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith restore to the employee the tenure suspended pursuant to paragraph (f) of this subdivision, and notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The

determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

3. (a) An employee organization which is determined by the board to have violated the provisions of subdivision one of this section shall, in accordance with the provisions of this section, lose the rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of this chapter.

(b) In the event that it appears that a violation of subdivision one of this section may have occurred, it shall be the duty of the chief executive officer the public employer involved (i) forthwith to so notify the board and the chief legal officer of the government involved, and (ii) to provide the board and such chief legal officer with such facilities, assistance and data as will enable the board and such chief legal officer to carry out their duties under this section.

(c) In the event that it appears that a violation of subdivision one of this section may have occurred, the chief legal officer of the government involved, or the board on its own motion, shall forthwith institute proceedings before the board to determine whether such employee organization has violated the provisions of subdivision one of this section.

(d) Proceedings against an employee organization under this section shall be commenced by service upon it of a written notice, together with a copy of the charges. A copy of such notice and charges shall also be served, for their information, upon the appropriate govenment officials who recognize such employee organization and grant to it the rights accompanying such recognition. The employee organization shall have eight days within which to serve its written answer to such charges. The board's hearing shall be held promptly thereafter and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses in their behalf. Compliance with the technical rules of evidence shall not be required.

(c) In determining whether an employee organization has violated subdivision one of this section, the board shall consider (i) whether the employee organization called the strike or tried to prevent it, and (ii) whether the employee organization made or was making good faith efforts to terminate the strike.

(f) If the board determines that an employee organization has violated the provisions of subdivision one of this section, the board shall order forfeiture of the rights granted pursuant to the provisions of paragraph (b) of subdivision one, and subdivision three of section two hundred eight of this chapter, for such specified period of time as the board shall determine, or, in the discretion of the board, for an indefinite period of time subject to restoration upon application, with notice to all interested parties, supported by proof of good faith compliance with the requirements of subdivision one of this section since the date of such violation, such proof to include, for example, the successful negotiation, without a violation of subdivision one of this section, of a contract covering the employees in the unit affected by such violation; provided, however, that where a fine imposed on an employee organization pursuant to subdivision two of section seven hundred fifty-one of the judiciary law remains wholly or partly unpaid, after the exhaustion of the cash and securities of the employee organization, the board shall direct that, notwithstanding such forfeiture, such membership dues deduction shall be continued to the extent necessary to pay such fine and such public employer shall transmit such moneys to the court. In fixing the duration of the forfeiture, the board shall consider all the relevant facts and circumstances, including but not limited to: (i) the extent of any wilful defiance of subdivision one of this section (ii) the impact of the strike on the public health, safety, and welfare of the community and (iii) the financial resources of the employee organization; and the board may consider (i) the refusal of the employee organization or the appropriate public employer or the representative thereof, to submit to the

mediation and fact-finding procedures provided in section two hundred nine and (ii) whether, if so alleged by the employee organization, the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike. In determining the financial resources of the employee organization, the board shall consider both the income and the assets of such employee organization. In the event membership dues are collected by the public employer as provided in paragraph (b) of subdivision one of section two hundred eight of this chapter, the books and records of such public employer shall be prima facie evidence of the amount so collected.

(g) An employee organization whose rights granted pursuant to the provisions of paragraph (b) of subdivision one, and subdivision three of section two hundred eight of this article have been ordered forfeited pursuant to this section may be granted such rights after the termination of such forfeiture only after complying with the provisions of clause (b) of subdivision three of section two hundred seven of this article.

(h) No compensation shall be paid by the public employer to a public employee with respect to any day or part thereof when such employee is engaged in a strike against such employer. The chief fiscal officer of the government involved shall withhold such compensation upon receipt of the notice provided by paragraph (e) of subdivision two of section two hundred ten; notwithstanding the failure to have received such notice, no public employee or officer having knowledge that such employee has so engaged in such a strike shall deliver or cause to be delivered to such employee any cash, check or payment which, in whole or in part, represents such compensation.

4. Within sixty days of the termination of a strike, the chief executive officer of the government involved shall

prepare and make public a report in writing, which shall contain the following information: (a) the circumstances surrounding the commencement of the strike, (b) the efforts used to terminate the strike, (c) the names of those public employees whom the public officer or body had reason to believe were responsible for causing, instigating or encouraging the strike and (d) related to the varying degrees of individual responsibility, the sanctions imposed or proceedings pending against each such individual public employee.

**§211. Application for injunctive relief**

Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that public employees or an employee organization threaten or are about to do, or are doing, an act in violation of section two hundred ten of this article, the chief executive officer of the government involved shall (a) forthwith notify the chief legal officer of the government involved, and (b) provide such chief legal officer with such facilities, assistance and data as will enable the chief legal officer to carry out his duties under this section, and, notwithstanding the failure or refusal of the chief executive officer to act as aforesaid, the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation. If an order of the court enjoining or restraining such violation does not receive compliance, such chief legal officer shall forthwith apply to the supreme court to punish such violation under section seven hundred fifty of the judiciary law.

## APPENDIX E

### Railway Labor Act, 45 U.S.C. §151 and §151a:

### §151. Definitions

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

**§151a. General purposes**

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

## APPENDIX F

**Interstate Commerce Act, 49 U.S.C. §10501:**

**SUBCHAPTER I — RAIL, RAIL — WATER, EXPRESS, AND PIPELINE CARRIER TRANSPORTATION**

**§10501. General jurisdiction**

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle; or

(2) transportation by a water common carrier when that transportation would be subject to this subchapter only because the water common carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, a switching, terminal, lighterage, car rental, trackage, handling, or other charge by a rail carrier for services in the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(c) This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

## APPENDIX G

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

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8 NMB No. 89
File No. C-5045

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IN THE MATTER OF
LONG ISLAND RAILROAD COMPANY
and
STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY

---

**Interim Order**
(March 9, 1981)

---

On September 22, 1980, the National Mediation Board ordered the Metropolitan Transportation Authority (MTA); and Long Island Rail Road (LIRR); and the Staten Island Rapid Transit Operating Authority (SIRTOA), constituent agencies of the MTA; American Train Dispatchers Association; Brotherhood of Locomotive Engineers; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Brotherhood of Railroad Signalmen; Brotherhood Railway Carmen of the United States and Canada; International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers; International Brotherhood of Boilermakers and Blacksmiths; International Brotherhood of Firemen and Oilers; International Brotherhood of Teamsters; Police Benevolent Association; Railroad Yardmasters of America; Sheet Metal Workers International Association and United Transportation Union, to show cause on or before November 17, 1980, why the National Mediation Board should not cease

to excercise jurisdiction over the LIRR and SIRTOA, as constituent agencies of MTA, in conformance with the September 15, 1980, decision of the United States Court of Appeals for the Second Circuit in *United Transportation Union* v. *Long Island Rail Road Company and Metropolitan Transportation Authority of New York*, 105 LRRM 2465 (2nd Cir. 1980).

NMB File No. C-5045 was assigned to this matter for purposes of identification.

**BACKGROUND**

On December 6, 1979, the United Transportation Union (UTC) filed suit in the United States District Court for the Eastern District of New York seeking, inter alia, a declaratory judgment that the relationship between the UTU and MTA was governed by the Railway Labor Act and that the employees could not be subjected to the sanctions contained in the Taylor Law, N.Y. Civ. Serv. Law §§200-214, in the event they engaged in "self-help" as allowed under the Railway Labor Act. On December 8, 1979, the mediatory provisions of the Railway Labor Act having been exhausted, the UTU employees went on strike. On December 14, 1979, President Carter established Emergency Board No. 192 and the employees returned to work. The cooling off provisions of section 10 expired on February 14, 1980.

On February 8, 1980, MTA voted to convert the Long Island Railroad from a private stock corporation to a public benefit corporation whose employees would be facially subject to the Taylor Law.

The District Court in its decision on March 5, 1980, 103 LRRM 3069, found that:

> There are three major issues confronting us:
>
> (1) Is the railroad a 'carrier' subject to the Act;
>
> (2) If so, does the Act preempt the application of the Taylor Law to the railroad's employees;
>
> (3) If the Taylor Law may not be applied to bar a strike by the plaintiff's members, what is the appropriate relief.

The Court first found that the Long Island Rail Road was a carrier within the meaning of the Railway Labor Act. It then went on the discuss whether employees of the LIRR are free to resort to self-help permitted by the Railway Labor Act or the subject to the prohibition and penalties of the Taylor Law.

> While the issue is of extreme importance, we do not think that it would serve any useful purpose to embark on a lengthy discussion of the relationship between the pertinent federal and state legislation. We have only recently dealt with the identical issue in a remarkably analogous context. In *Brotherhood of Locomotive Engineers* v. *Staten Island Rapid Tranist Operating Authority* 100 LRRM 3154 (E.D.N.Y. 1979) we were asked to decide whether the Taylor Law could be applied to employees of another MTA subsidiary, the Staten Island Rapid Transit Operating Authority ("SIRTOA"). We held that if SIRTOA was subject to the [Railway Labor] Act its employees were free to engage in strike activities notwithstanding the fact that SIRTOA was a public benefit corporation whose employees were therefore subject to the Taylor Law's proscription of such conduct.

On September 15, 1980, the District Court decision was reversed by the Second Circuit. While agreeing with the District Court that the LIRR is a carrier subject to the Railway Labor Act, the Circuit Court found that this was only the beginning of its inquiry.

> If the LIRR was a privately owned carrier, the commerce clause regulation would prevail, and no further analysis would be required. The LIRR is a wholly owned subsidiary of a state agency, however, and appellants urge that even if the LIRR is subject to the literal terms of the RLA, that Act may not be enforced so as to allow a strike because it interferes with an integral state function, namely, the State's ability to structure employer-employee relationships in public commuter transportation.

* * *

> The inquiry is therefore essentially two-tiered. To determine whether MTA's operation of the LIRR falls within the sphere of protected state activity, we must first consider whether the operation of the railroad qualifies as a integral or traditional government function. If it does, the federal interest in regulating the collective bargaining relations of LIRR employees under the Railway Labor Act must be weighed against the State's interest in applying the Taylor Law.

The Court went on to weigh those interests as it saw them and concluded:

> In sum, we recognize that the LIRR would come under the literal terms of the RLA, see *California v. Taylor, supra,* and that the right to strike, free from state interference, has been held essential to that federal scheme, *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-82 (1969). In the present context, however, the federal interest in preserving the right of LIRR employees if not "demonstrably greater" than New York State's interest in preventing LIRR strikes in order to ensure continuous passenger service for so many daily commuters. We reach this result with the realization that the determination of whether state or federal interests are paramount may be difficult to resolve in future cases. However, that diffioulty cannot preclude a conclusion required by the present circumstances and authorities.

Following the Second Circuit's decision, the UTU and various amici curiae requested that the court grant a rehearing or a rehearing en banc of the three-judge panel's decision. Determination of the issues raised by the Board's Order to Show Cause was held in abeyance pending the Court's ruling on that request. On December 17, 1980, the Second Circuit denied the request for a rehearing and advised that en banc rehearing would not be granted, thereby leaving the panel's

decision undisturbed. In view of these events, the Board finds as follows:

**ISSUE**

The issue is whether the NMB should refrain from exercising any or all of its statutory jurisdiction over the LIRR and SIRTOA, as constituent agencies of the MTA, in light of the decision of the Court of Appeals. That decision held, in essence, that the Railway Labor Act, 45 U.S.C. §151 et seq., and the New York State Taylor Lew, N.Y. Civ. Serv. Law §§200-214, both applied to collective bargaining on LIRR, and by implication to SIRTOA. The effect of that decision is that certain provisions of that Taylor Law either apply concurrently with or supercede provisions of the RLA.

**CONTENTIONS**

The MTA filed a response to the Board's Order to Show Cause on behalf of itself and LIRR and SIRTOA. It is the MTA's position that the Taylor Law, not the RLA, governs labor relations on LIRR and SIRTOA, and that the Second Circuit's decision "requires the end of the NMB's jurisdiction" over those carriers. MTA asserts that no part of the RLA applies to those carriers, and that the Taylor Law applies in its entirety.

The United Transportation Union (UTU) and International Association of Machinists and Aerospace Workers (IAM&AW) filed a joint response. These organizations assert that the Board should continue to exercise jurisdiction, at least until the litigation is terminated, because of the disruptive effects which would follow. UTU and IAM&AW further assert that the court found that LIRR was a carrier subject to the RLA, and that its decision is ambiguous.

The American Train Dispatchers Association (ATDA), International Brotherhood of Electrical Workers (IBEW), International Brotherhood of Firemen and Oilers (IBFO), Brotherhood Railway Carmen of the United States and Canada (BRC), Sheet Metal Workers International Associa-

tion (SMWIA) and International Brotherhood of Boilermakers and Blacksmiths (IBBB), filed a joint response. These organizations contend that the court's decision is inconsistent with established Supreme Court precedent and is based upon improper and incorrect interpretation of the mejor precedent relied upon. The organizations urge the Board not to cease exercising jurisdiction under the RLA.

The LIRR Patrolmen's Benevolent Association (PBA) urges the Board to maintain jurisdiction based upon the carriers' undisputed connection to interstate commerce, and the District Court decision overruled by the Second Circuit. In addition, it points to various other Federal laws applicable to the LIRR, and to litigation confirming SIRTOA's status as a carrier under the RLA.

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) filed a response asserting that the Second Circuit's decision cannot be a basis for withdrawal of the NMB's jurisdiction because it constitutes an unwarranted application of precedent and is susceptible of contradictory interpretations.

The Brotherhood of Locomotive Engineers (BLE), Brotherhood of Railroad Signalmen (BRS), and Railroad Yardmasters of America (RYA) filed a joint response asserting that the Board does not have the power to cease exercising its jurisdiction over LIRR and SIRTOA. These organizations also state that the court ruling only holds that LIRR and SIRTOA employees may not strike.

BRC filed an additional individual response contending that only the right to strike was superceded by the Taylor Law, and that the rest of the RLA is still applicable.

## DISCUSSION

### I.

It is clear that the Court of Appeals did not divest the NMB of jurisdiction over the LIRR in its decision, but rather

sought to balance Federal and state interests in the labor-management relations of the LIRR. Indeed, the court's opinion begins with the statement "The LIRR is a rail common carrier. . . ." The Board does not, therefore, view this case as one involving its jurisdiction over a carrier subject to the RLA. Rather, the Board finds that the only issue for its consideration is whether it should continue to exercise its jurisdiction in light of the court's holding that there is *concurrent* RLA-Taylor Law jurisdiction.

II.

The Board cannot, as urged by several of the organizations, ignore the decision of the Court of Appeals. Unless or until that decision is modified or overruled by the United States Supreme Court, this Board is bound by its holding.

The Court of Appeals has determined that, because the state interest as the employer of LIRR employees outweighs the Federal interest in the flow of interstate commerce, the Taylor Law antistrike provisions apply. Given this fact the NMB must determine what its mediatory responsibilities are under the Second Circuit's decision.

III

Mediation under the Railway Labor Act has a long history. It is founded on a theory of intensive and lengthy mediation with a termination stated in Section 5, First as follows:

> If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration in accordance with the provisions of this Act.
>
> If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have

failed and for thirty days thereafter, unless in the intervening period the parties agree to arbftration, or an emergency board shall be created under Section 10 of this Act, no change ehall be made in rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

The statutory scheme is a comprehensive plan.[1] It's components cannot be segregated and still have meaning. The possibility of the Board's terminating its mediatory services, with the consequences which flow from such action, is as much a part of its mediatory process as anything else. Yet by superimposing the Taylor Law anti-strike prowfsions upon the Board's mediatory services, the Court destroys the only real power that this Board has to induce compromise and ultimate agreement by the parties. Without the uncertainty in collective bargaining created by the Railway Labor Act, mediation can just as easily be undertaken by State mediators. And, in fact, considering local conditions, perhaps local mediators may be

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[1] This machinery was succinctly described by Justice Harlan in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378, (1969):

> "The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. [Section] 6. The parties must confer, [Section] 2 Second, and if conference faile to resolve the dispute, either or both may invoke the services of the National Mediation Board; which may also proffer its services *sua sponte* if it finds a labor emergency to exist. [Section] 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding artibration, which can take place, however, only if both consent. [Section]55 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportion service, the Mediation Board shall notify the President', who may create an emergency board to investigate and report on the dispute. [Section] 10. While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. [Section] 2 Seventh, 5 First, 6, 10."

more in tune with the news of the state officials who now, under the Second Circuit decision, obviously are in complete control of the negotiations.

It therefore seems that in this era of fiscal restraint and transfer of state functions back to the states that the NMB should allow the state of New York the opportunity to solve what the Court finds to be primarily a state problem.

IV.

In its brief, MTA has taken the position that the Taylor Law, not the Railway Labor Act, governs labor relations on the LIRR and SIRTOA. We are unable to read such a broad conclusion into the Court's decision. While such a reading is possible, this contention was not raised before both courts that heard the cases. Furthermore, the courts gave no indication that there has been any consideration of the other functions mandated by the Railway Labor Act; i.e., the choosing of collective bargaining representatives and the settlement of minor disputes (grievances).[2]

What is clear is that in its decision, the Second Circuit was examining the mediatory functions of the Railway Labor Act and its possible interplay with the Taylor Law. There is no indication that the Court intended to change representation rights or grievance and arbitration procedures for these MTA employees. Accordingly, we find no reason to cede our undoubted jurisdiction in the representation area or the area of the settlement of minor disputes.

---

[2] The Board is requried, under Section 2, Ninth, to investigate representation disputes and certify who are the representatives of employees in a craft or class, utilizing a secret ballot or other appropriate means of ascertaining the choice of the majority of the employees in the craft or class. Section 3 of the Act establishes procedures for the arbitration of grievances or disputes over the interpretation or application of collective bargaining agreements in the railroad industry.

V.

Finally, we should note that deferral to the exercise of state jurisdiction in labor relations matters where concurrent jurisdiction exists would also further the Congressional policy. A recent report of the General Accounting Office, "The Federal Mediation and Conciliation Service Should Strive to Avoid Mediating Minor Disputes", (HRD-81-14, October 3n, 1980), criticized FMCS for mediating labor disputes in states having adequate state mediation services, and for failing to assess the impact of the dispute on interstate commerce prior to asserting jurisdiction. In addition, the report questioned the legality of FMCS's mediation of state and local government employee disputes.

New York State has adequate mediatory services available. Statutory differences between NMB jurisdiction and FMCS jurisdiction make it clear that the RLA covers LIRR and SIRTOA whether their employees are state government employees or not. However, with respect to the assessment of a dispute's impact on interstate commerce, the Court of Appeals has ruled that the state's interests as an employer outweigh any Federal interest in interstate commerce.

Under these circumstances, we are confident that GAO would find that the use of Federal resources is not warranted in a state which provides comparable labor relations machinery.

CONCLUSION

LIRR and SIRTOA are "carriers" within the meaning of Section 1, First, of the Railway Labor Act. The right of the NMB to exercise jurisdiction over these carriers has not been altered by the Court of Appeals decision in *UTU* v. *LIRR*. However, unless and until the U.S. Supreme Court modifies or reverses the Court of Appeals, this Board is bound by the determination of that Court that the interests of the State of New York outweigh those of the Federal government, and that the RLA does not pre-empt application of the Taylor

Law to the carriers and their employees under the Supremacy clause and Commerce clause of the U.S. Constitution.

Accordingly, the National Mediation Board has determined that it is not in the Federal interest to expend Federal funds where the same services are provided by a state. The Board will immediately cease processing applications for mediation services on any carriers owned by the MTA. Cases presently docketed are hereby suspended. This determination may be reviewed following any action by the Supreme Court with respect to the Court of Appeals decision.

By direction of the National Mediation Board.

/s/ ROWLAND K. QUINN
Rowland K. Quinn, Jr.
*Executive Secretary*

Copies to:

Mr. Richard Ravitch, Chairman
Metropolitan Transportation Authority

Mr. John D. Simpson, Executive Director
Metropolitan Transportation Authority

Mr. Daniel Scannell, Acting President
& General Manager
Long Island Rail Road Company

Mr. James J. Miller
Chief Personnel Officer
Long Island Rail Road Company

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Mr. E. A. Duszak, General Superintendent
Staten Island Rapid Transit Operation Authority

Mr. B. C. Hilbert, President
American Train Dispatchers Association

Mr. John F. Sytsma, President
Brotherhood of Locomotive Engineers

Mr. Fred J. Kroll, Int'l President
Brotherhood of Railway, Airline and
Steamship Clerks

Mr. Frank Ferlin, President
American Railway Supervisors Association
Division-BRAC

Mr. R. T. Bates, President
Brotherhood of Railroad Signalmen

Mr. O. W. Jacobson, General President
Brotherhood Railway Carmen of the U.S.
and Canada

Mr. W. W. Winpisinger, Int'l President
International Association of Machinists and
Aerospace Workers, AFL-CIO

Mr. A. M. Ripp, Int'l Vice President
International Brotherhood of Electrical Workers

Mr. Harold J. Buoy, President
International Brotherhood of Boilermakers and
Blacksmiths

Mr. J. J. McNamara, President
International Brotherhood of Firemen and Oilers

Mr. Norman Greene, Director
National Airline Division
International Bnotherhood of Teamsters

Mr. Michel Matthaei, President
Police Benevolent Association

Mr. R. E. Martin, General Vice President
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Counsel for BLE, BRS and RYA

Honorable Harold Newman, Chairman
Honorable Ida Klaus, Member
Honorable David Randles, Member
New York State Public Employment Relations Board

RKQ/dca

## APPENDIX H

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD
50 WOLF ROAD
ALBANY, NEW YORK 12205

February 26, 1981

Robert McCullough, Esq.
1050 17th Street NW
Suite 701
Washington, D.C. 20036

Dear Mr. McCullough:

In response to your recent request for certain information regarding PERB's mediation and strike experience from September 1967 to December 31, 1980, the following represents what we are able to provide at this time:

PERB has received 9,476 impasses during that period. We are unable to tabulate the number involving transit employees.

During that period there have been 279 strikes with an estimated 4,105,000 worker days idle. There have been 9 transit strikes with an estimated 370,500 work days idle during that period. It should be noted that the single strike of the TWU in New York last year involved an estimated 360,000 work days idle.

We do not know the number of cases, if any, in which written agreement was made not to bring contempt proceedings nor do we know the number of such proceedings brought. We do know of 53 strikes in which unions have been held in contempt of court including 4 transit strikes where unions were held in contempt.

Very truly yours,

/s/ MARTIN L. BARR
Martin L. Barr
*Counsel*

MLB/mk

## APPENDIX I

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

March 31, 1981

Mr. Robert McCullough
Suite 701
1050 K Street, N.W.
Washington, DC 20036

Dear Mr. McCullough:

In response to your telephone request of February 17, 1981, to Mr. Ronald Etters of my staff, I am pleased to provide you the statistical information you required.

Sincerely,

/s/ ROWLAND K. QUINN, JR.
Rowland K. Quinn, Jr.
*Executive Secretary*

- enclosures -

RKQ/sks

**EMERGENCY BOARDS — LONG ISLAND RAIL ROAD — FY 1965 — FY 1980**

| | |
|---|---|
| E.B. 170 (NMB Case Nos. A-7970; E-322) | Brotherhood of Railroad Trainmen<br>International Brotherhood of Electrical Workers<br>International Association of Machinists & Aerospace Workers<br>created by Executive Order 11343 issued April 12, 1967. |
| E.B. 173 (NMB Case No. E-346) | United Transportation Union (BRT)<br>created by Executive Order 11442 issued December 27, 1968. |
| E.B. 182 (NMB Case No. A-9167) | Non-Operating Employees Conference Committee<br>created by Executive Order 11679 issued August 19, 1972. |
| E.B. 184 (NMB Case No. A-9200) | Brotherhood of Railroad Signalmen<br>created by Executive Order 11745 issued November 1, 1973. |
| E.B. 192 (11 "A" cases) | 7 unions involved<br>created by Executive Order 12182 issued December 14, 1979. |

## STRIKES AT THE LONG ISLAND RAIL ROAD, FY1965 — FY 1980

| Case No. | Union | Number of Em'ees | Date Began | Date Ended | Days Duration |
|---|---|---|---|---|---|
| A-9167 | Non-Operating Employees Conference Committee | 5,000 | 11/30/72 | 1/18/73 | 50 |
| A-10456, A-10489 | BRS | 4,000 | 12/8/79 and 4/1/80 | 12/14/79 and 4/3/80 | 6 2 |
| A-10441 | RYA | " " | " " | " " | " " |
| A-10434, A-10512 | IBT | " " | " " | " " | " " |
| A-10412, A-10527 | BRC | " " | " " | " " | " " |
| A-10442 | UTU | " " | " " | " " | " " |
| A-10457, A-10493 | BLE | " " | " " | " " | " " |
| A-10472 | PBA | " " | " " | " " | " " |

**MEDIATION CASES CLOSED ON THE LONG ISLAND RAIL ROAD, FY 1965 — FY 1980**

| | |
|---|---|
| FY 1965 ..... | — |
| 1966 ..... | — |
| 1967 ..... | 2 |
| 1968 ..... | 4 |
| 1969 ..... | — |
| 1970 ..... | — |
| 1971 ..... | 2 |
| 1972 ..... | — |
| 1973 ..... | 1 |
| 1974 ..... | 2 |
| 1975 ..... | 6 |
| 1976 ..... | 1 |
| 1977 ..... | — |
| 1978 ..... | 20 |
| 1979 ..... | — |
| 1980 ..... | 21 |
| TOTAL ..... | 59 |

## APPENDIX J

### CONSTITUTIONAL PROVISIONS

The Constitution of the United States of America provides in pertinent part:

Article I, Section 8:

> The Congress shall have the Power. . . .
>
> * * *
>
> To regulate Commerce . . . among the several States. . . .
>
> * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the Foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1925

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION,
*Petitioner,*

v.

LONG ISLAND RAILROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 15, 1981
CERTIORARI GRANTED JUNE 22, 1981

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

No. 18-1925

UNITED TRANSPORTATION UNION,
*Petitioner,*

v.

LONG ISLAND RAILROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

December 7, 1979—Plaintiff United Transportation Union's verified complaint for declaratory and injunctive relief filed in the U.S. District Court for the Eastern District of New York.

February 21, 1980—Defendants Long Island Railroad Company and Metropolitan Transportation Authority's Answer filed.

February 28, 1980—By Plaintiff's motion, Order to Show Cause for why summary judgment should not be granted, was filed, signed by Chief Judge Mishler (dated February 27, 1980).

March 4, 1980—Hearing before Chief Judge Mishler on plaintiff's motion for summary judgment. Summary judgment granted for plaintiff. Judgment filed.

March 7, 1980—Memorandum of Decision (dated March 5, 1980) by Chief Judge Mishler filed.

March 11, 1980—Defendants filed notice of appeal. Record on appeal certified and mailed to the Court of Appeals for the Second Circuit.

April 18, 1980—Case argued before Mulligan, C.J., Spears, and Sweet, D.J.

September 15, 1980—Judgment reversed and filed.

September 26, 1980—Appellee United Transportation Union filed motion for stay of mandate pending application to the Supreme Court for writ of certiorari.

October 3, 1980—Appellee's motion for stay of mandate granted.

October 14, 1980—Appellee's petition for rehearing with a suggestion for rehearing en banc filed.

December 17, 1980—Order filed denying appellee's petition for rehearing with a suggestion for rehearing en banc.

December 22, 1980—Appellee filed motion for order staying issuance of mandate.

February 13, 1981—Order filed granting appellee's motion for stay of mandate.

March 4, 1981—Appellee filed motion for order staying issuance of mandate.

March 6, 1981—Order filed granting appellee's motion for stay of mandate.

April 13, 1981—Appellee filed motion for order staying issuance of mandate.

April 27, 1981—Order filed granting appellee's motion for stay of mandate.

May 26, 1981—Notice of filing petition for writ of certiorari filed.

June 29, 1981—Certified copy of order of Supreme Court granting petition for writ of certiorari filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Case No. 79C3118

UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, Ohio 44107

*Plaintiff,*

vs.

LONG ISLAND RAIL ROAD COMPANY
Jamaica Station
Jamaica, New York 11435,

and

METROPOLITAN TRANSPORTATION AUTHORITY
OF NEW YORK
1700 Broadway
New York, New York 10019

*Defendants.*

## VERIFIED COMPLAINT OF UNITED TRANSPORTATION UNION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

This is an action by the United Transportation Union (hereinafter referred to as "UTU") against the Long Island Rail Road Company (hereinafter referred to as the "Long Island") and the Metropolitan Transportation Authority of New York (hereinafter referred to as "MTA") for declaratory and injunctive relief arising out of a dispute governed by the provisions of the Railway Labor Act, as amended, (45 U.S.C. §§ 151 *et seq.*). The plaintiff's causes of action against the defendant Long Island are set forth in two counts as follows:

## JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief against defendant Long Island and MTA arising

out of a dispute governed by the provisions of the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*). This Court has jurisdiction of the action under the provisions of Title 28 of the United States Code, Sections 1331 and 1337. The action is one arising under the laws of the United States within the meaning of § 1331(a) and the matter in controversy exceeds the value of Ten Thousand Dollars ($10,000), exclusive of interest and costs. The action also arises under an Act of Congress regulating commerce pursuant to which United States District Courts have original jurisdiction pursuant to the provisions of § 1337. This Court has jurisdiction to grant plaintiff declaratory relief pursuant to the provisions of Title 28, § 2201, of the United States Code (28 U.S.C. § 2201) and also has jurisdiction to grant further necessary or proper relief pursuant to the provisions of Title 28, § 2202, of the United States Code (28 U.S.C. § 2202). This Court also has jurisdiction to grant plaintiffs prayers for relief pursuant to Title 28 of the United States Code, § 1651, which authorizes a United States District Court to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law.

2. Venue properly resides in this judicial district pursuant to the provisions of § 1391(c) of the United States Code. The Long Island maintains its principal place of business in this judicial district, is licensed to do business and is, in fact, doing business within this judicial district. MTA is the sole owner of the Long Island and doing business within this judicial district.

## THE PARTIES

3. Plaintiff UTU is an unincorporated labor organization, national in scope, representing the craft or class of conductors, brakemen, switchmen, firemen, motormen, collectors and related employees comprising the train crew on virtually every railroad in the United States,

including the Long Island, pursuant to the provisions of the Railway Labor Act. UTU has been certified and recognized by the National Mediation Board as the exclusive collective-bargaining representative under the Railway Labor Act for those employees within the said craft or class employed by the Long Island. UTU maintains its headquarters at 14600 Detroit Avenue, Cleveland, Ohio 44107, and represents employees of the Long Island who perform service for the Long Island within this judicial district. UTU is a party to collective-bargaining agreements with the Long Island governing rates of pay, rules and working conditions of Long Island employees represented by UTU which were negotiated and are maintained in accordance with the requirements of the Railway Labor Act.

4. Defendant Long Island is a domestic corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at Jamaica Station, Jamaica, in the Borough of Queens, City and State of New York and is a Class I railroad engaged in business as a common carrier for hire in the transportation of passengers and property in interstate and foreign commerce subject to the provisions of Part 1 of the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*) and is a "carrier" within the meaning of that term as defined in the Railway Labor Act. The railroad is an integral part of the nationwide railway system of the United States and governed by the provisions of the Interstate Commerce Act and the Railway Labor Act and connects and interchanges freight and passengers with other railroads engaged in interstate commerce. Service of summons and of the Complaint can be made in accordance with the provisions of Rule 4(d)(3) of the Federal Rules of Civil Procedure upon defendant Long Island by serving the summons and Complaint upon either Mr. Francis S. Gabreski, President, or Mr. Thomas Taranto, General Counsel, Long

Island Rail Road Company, Jamaica Station, Jamaica, New York 11435.

5. Defendant MTA is an agency of the State of New York. It is the sole stockholder of the Long Island. Its principal offices are located at 1700 Broadway, New York, New York 10019. Service of summons and of the Complaint can be made by serving the summons and Complaint upon Mr. Robert Abrams, Attorney General of State of New York, Two World Trade Center, New York, New York 10047.

## COUNT I

## STATEMENT OF PLAINTIFF'S CAUSE OF ACTION UNDER COUNT I

6. Section 2, First of the Railway Labor Act (45 U.S.C. § 152, First) requires railroads and employees subject to the provisions of that statute to use every reasonable effort to make and maintain collective-bargaining agreements and to settle disputes arising out of such agreements. Sections 5 and 6 of the Act (45 U.S.C. §§ 155 and 156) establish mandatory procedures for changing provisions of collective-bargaining agreements in the railroad industry. Section 6 of the Railway Labor Act (45 U.S.C. § 156) requires carriers and representatives of employees to give written notice of an intended change in collective-bargaining agreements affecting rates of pay, rules and working conditions and sets forth a mandatory procedure to be followed in the negotiation of such proposed changes. Section 5 of the Railway Labor Act (45 U.S.C. § 155) authorizes either party to a dispute between employees and a carrier subject to the Act to invoke the services of the National Mediation Board to mediate any dispute concerning changes in rates of pay, rules and working conditions not resolved by parties themselves in conference. That section further provides that if the efforts of the National Mediation Board to bring about a settlement of such a dispute through media-

tion are unsuccessful, the Board shall endeavor as its final required action to induce the parties to submit the controversy to arbitration and that, if arbitration at the request of the Board shall be refused by one or both parties, the Mediation Board shall at once notify both parties in writing that its mediatory efforts have failed and shall terminate mediation. Section 5 finally provides that no change shall be made in the rates of pay, rules and working conditions or established practices in effect between the parties prior to the time that the dispute arose until the expiration of the thirty (30) days after the Board has notified the parties of the failure of mediation. Upon the expiration of such 30-day period, the parties are free to exercise self-help unless the President of the United States appoints an Emergency Board to investigate and report with respect to the dispute in accordance with the provisions of Section 10 of the Railway Labor Act (45 U.S.C. § 160). Under that section, after the creation of an Emergency Board and for 30 days after such Board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. Thereafter, the parties may resort to self-help if the dispute remains unresolved.

7. On June 29, 1978, Plaintiff UTU served written notice upon the defendant Long Island of intended changes in its agreement with the Long Island affecting rates of pay, rules and working conditions of employees of the Long Island represented by said plaintiff in accordance with the requirements of Section 6 of the Railway Labor Act. Plaintiff served subsequent Section 6 notices on the Long Island on November 1 and 15, 1978, December 15, 1978, and February 16, 1979. Plaintiff has fully complied with the mandatory provisions of Section 6 in an effort to reach agreement through conferences with the representatives of the Long Island with respect to such proposed changes. When such efforts were

unsuccessful, the parties on April 5, 1979, filed a joint application with the National Mediation Board, invoking its services in the mediation of the dispute. The Board thereupon undertook such mediation but failed to resolve the dispute in the course of that stage. On November 7, 1979, the Board advised plaintiff UTU in writing that its mediatory efforts had failed and that it was terminating mediation. The 30-day status quo provided by Section 5 of the Railway Labor Act after such notification expires at midnight on Friday, December 7, 1979. No Emergency Board has been appointed by the President of the United States to investigate and report upon the dispute. Therefore, under the provisions of the Railway Labor Act, the plaintiff UTU and the Long Island employees it represents have a fundamental right under the Railway Labor Act to resort to self-help after midnight on December 7, 1979. This right to self-help at this stage of the dispute is Federally guaranteed against interference by Federal or State Courts. (29 U.S.C. § 101 *et seq.*).

8. Since the notification by the National Mediation Board to plaintiff UTU that it had released this dispute from mediation, plaintiff has voluntarily met under the auspices of that Board in further sessions with representatives of the Long Island in an effort to negotiate a settlement of the dispute between it and the Long Island. The Long Island's persistence in its token responses has resulted in the failure of this final effort by the Board to effect a peaceful resolution of the dispute.

9. The Long Island is a carrier subject to the Railway Labor Act and its labor relations are governed by the Railway Labor Act. As throughout the history of labor relations on this property, plaintiff and the Long Island processed their current dispute under the provisions of the Railway Labor Act. On November 21, 1979, the Interstate Commerce Commission in a proceeding identified as *Brotherhood of Locomotive Engineers*,

*et al.* v. *Staten Island Rapid Transit Operating Authority* (360 I.C.C. Report 464), in which UTU was one of the petitioners, issued a decision in which it restated at page 475 the long established fact that the Long Island is a carrier subject to the Interstate Commerce Act which in turn makes it a carrier subject to the Railway Labor Act. In that decision, the ICC at page 477 also stated as follows with respect to the Railway Labor Act:

> "The act essentially affords procedural, but by no means insubstantial devices by which to settle labor disputes. Implicit in the statutory scheme is the fundamental right to resort to self-help once the devices are exhausted. See *Brotherhood of Railroad Trainmen et al.* v. *Jacksonville Terminal Co.*, 394 U.S. 369 at 377-380 (1969)."

It is thus an established fact that the Long Island is a carrier subject to the Railway Labor Act, that such Act exclusively governs labor relations of the Long Island, and that UTU and the employees of the Long Island whom it represents have a Federal right to resort to self-help to resolve disputes concerning changes in existing collective-bargaining agreements where, as here, the mandatory statutory provisions of that Act have been exhausted. However, for a number of years, it has been and continues to be the position of the MTA and the Long Island (a) that both the statutory and common law of the States of New York prohibit the resort to self-help by the employees of the Long Island despite the guarantees of the Railway Labor Act protecting self-help following exhaustion of the mandatory bargaining procedures and (b) that MTA and the Long Island may properly restrain in State Court proceedings the employees of the Long Island from exercising their Federally guaranteed rights. This position is set forth by Mr. Harold Tompkins, Assistant Attorney General of the State of New York in an affidavit to this Court, dated December 9, 1977, in

*MTA and the Long Island* v. *United Transportation Union, et al.* (77 Civil 23580) involving a motion by the MTA and the Long Island to remand the case from this Court to the Supreme Court of the State of New York, County of Queens, from which it had been removed by the UTU pursuant to Federal law. This position of defendants has continued to the present time and has never been withdrawn or changed to the knowledge and belief of the plaintiff. It has been continuously asserted in litigation before this Court concerning the Staten Island Rapid Transit Operating Authority (SIRTOA) identified as *Brotherhood of Locomotive Engineers, et al.* v. *SIRTOA, et al.* (78 C. 2083) and *System Federation No. 1, Railway Employes Dept., et al.* v. *John G. DeRoos, et al.* (78 C. 1931), in which UTU is one of the plaintiffs.

10. Moreover, this position of the defendants MTA and the Long Island that New York common and statutory law prohibit the employees of the Long Island from exercising their Federal right of self-help has been rejected by this Court in a 1979 decision in the SIRTOA cases cited above, in which plaintiff UTU was one of the plaintiffs. This Court rejected the application of New York State Law, which is referred to as the Taylor Law, to railroad employees subject to the Railway Labor Act in a decision of Chief Judge Mishler dated February 9, 1979, in which the Court (page 21) stated "Whether in the public sector or in the private sector, employees subject to the Railway Labor Act have a guaranteed right to engage in peaceable strike activities." This Court deferred the issue of whether SIRTOA is a Railway Labor Act carrier to the Interstate Commerce Commission which subsequently found in the affirmative in a unanimous decision of November 21, 1979, cited above. The Commission held that both SIRTOA and the Long Island were carriers subject to the Railway Labor Act which, as above described, guarantees its employees the right to exercise self-help following exhaustion of the mandatory pro-

cedures. This matter is now before this Court on a motion by UTU and other plaintiff railway labor organizations in that matter to reconsider its judgment in light of the ICC action. Thus, there exists an actual present controversy between the MTA and the Long Island on the one hand and UTU on the other hand as well as other railway labor organizations with respect to the application of New York State law to prevent employees of the Long Island from engaging in self-help guaranteed by the Railway Labor Act appropriate for resolution by a declaratory judgment of this Court. A decision of this Court declaring the rights of employees of the Long Island is necessary to the protection of their Federally established rights.

11. The making and maintenance of collective-bargaining agreements between UTU and the Long Island governing the rates of pay, rules and working conditions of the employees of the Long Island represented by UTU and the making of changes in those collective-bargaining agreements including the fundamental rights of the employees to engage in self-help against the Long Island where the mandatory provisions of the Railway Labor Act have failed to resolve disputes concerning such changes, are exclusively governed by the Railway Labor Act, are protected by the Norris-LaGuardia Act and are not subject to any law or regulation of the State of New York. Resort by the Long Island and/or the MTA to a New York State Court action to interfere with the exercise of the Federal rights of the employees of the Long Island represented by UTU in the present disputes is in violation of the Railway Labor Act and the Norris-LaGuardia Act and State Court action interfering with such rights would be in contravention of the Supremacy Clause of the United States Constitution. The resort by either or both of these two defendants to a State Court to prohibit the employees of the Long Island represented by UTU from exercising Federally protected rights will

substantially injure those rights at least by delaying their exercise over a substantial period of time and will cause irreparable injury to plaintiffs and those employees. Such injury to Federally protected rights is threatened unless this Court grants declaratory relief to prevent the defendants or either of them from resorting to State Court action since defendants will resort to state courts to prevent the exercise of such rights in accordance with their established and continued position set forth above.

## PRAYER FOR RELIEF

WHEREFORE, plaintiff UTU prays that this Court enter the following orders and judgments in Count I of this Complaint:

(1) A declaratory judgment that the Long Island is a carrier within the meaning of the Interstate Commerce Act and the Railway Labor Act; and

(2) A declaratory judgment that the employees of the Long Island represented by plaintiff UTU are exclusively governed by the Railway Labor Act with respect to the making and maintenance of collective-bargaining agreements governing rates of pay, rules and working conditions of such employees, including the making of changes in such agreements, and are entitled to the rights provided by that Federal Statute with respect thereto, including the right of self-help upon the exhaustion of the mandatory provisions of the Railway Labor Act governing proposed changes; and

(3) A declaratory judgment that State law, namely the New York Civil Service Law, §§ 200 *et seq.*, is inapplicable to employees of the Long Island and accordingly that said employees of the Long Island represented by UTU are free to exercise self-help after midnight on December 7, 1979, with respect to the pending dispute between UTU and the Long Island concerning proposed changes in collective-bargaining agreements governing

the rates of pay, rules and working conditions of employees represented by UTU; and

(4) Reasonable attorneys' fees; and

(5) The cost of this action; and

(6) Such other and different relief that may be appropriate in these premises.

## COUNT II

### STATEMENT OF PLAINTIFF'S CAUSE OF ACTION UNDER COUNT II

12. Plaintiff UTU realleges allegations contained in paragraphs 1 through 11 in Count I of this Complaint above and incorporate and adopt those allegations herein as allegations under Count II of this Complaint.

13. An injunction by this Court is needed in order to restrain interference by the Long Island or any officer or agent thereof and/or its parent MTA or any person or entity acting on behalf of the Long Island or MTA with the UTU and/or the employees of the Long Island whom it represents in the exercise of Federally guaranteed rights of self-help in the labor dispute described in Count I above with respect to which all mandatory provisions of the Railway Labor Act have been exhausted and which will be available to them at 12:01 a.m. December 8, 1979.

14. The injunctive relief prayed for in this Complaint is also necessary in the aid of this Court's jurisdiction to consider and grant the clearly required declaratory relief prayed for by this Complaint. In the absence of such relief, the defendants or either of them can resort to State Court action and defeat the very Federal rights which this Court is asked to declare by this Complaint and they will do so in accordance with their well-established legal positions already asserted to this Court. This Court is clearly the proper forum to determine the Federal rights

of the employees of the Long Island involved which it has already declared in the SIRTOA cases cited above. The injunctive relief is also clearly necessary to protect and effectuate a declaratory judgment by this Court with respect to Federal rights of the plaintiff and employees of the Long Island whom it represents.

## PRAYER FOR RELIEF

WHEREFORE, plaintiff UTU prays that this Court enter orders and judgments under Count II of this Complaint as follows:

(1) A permanent injunction restraining defendant Long Island, its officials and agents and/or its parent MTA or any person or entity acting upon their behalf from attempting to interfere in any manner with the exercise of such Federal rights, including the filing of a State Court action in the State of New York to enjoin such exercise of Federal rights or pursuing any such State Court action which may have been filed; and

(2) A preliminary injunction granting plaintiffs the relief requested in paragraph (1) above pending a hearing on this Complaint and the granting of the relief prayed for in paragraphs (1) through (3) of the prayer for relief in Count I above; and

(3) A temporary restraining order granting the relief requested in paragraph (1) above for the period permitted by Federal law for such relief; and

(4) Reasonable attorneys' fees; and

(5) Costs of this action; and

(6) Any other and different relief which may be appropriate in the premises.

HIGHSAW, MAHONEY &
FRIEDMAN, P.C.

By /s/ Edward D. Friedman
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Attorneys for
United Transportation Union

Date: December 6, 1979

## VERIFICATION OF COMPLAINT

EDWARD YULE, JR., being duly sworn deposes and says that he is the duly elected General Chairman of the United Transportation Union, General Committee of Adjustment, Long Island Railroad, the plaintiff in the above-entitled case; that he is familiar with the labor dispute which is the subject matter of this Complaint; that he has read the Complaint; and that all of the allegations therein are true and correct to the best of his knowledge and belief.

/s/ Edward Yule, Jr.
EDWARD YULE, JR.

Subscribed and sworn to before me
this 5th day of December, 1979.

/s/ Beverly M. Bird
Notary Public

My Commission Expires: 10/19/81

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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79 Civ. 3118 (JM)

UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, Ohio 44107
*Plaintiff,*

—against—

LONG ISLAND RAIL ROAD COMPANY
Jamaica Station
Jamaica, New York 11435,

and

METROPOLITAN TRANSPORTATION AUTHORITY
OF NEW YORK
347 Madison Avenue
New York, New York 10017
*Defendants.*

---

**ANSWER**

Defendants The Long Island Rail Road Company ("LIRR") (sued herein as Long Island Rail Road Company) and Metropolitan Transportation Authority of New York ("MTA") for their answer to the complaint herein:

1. Deny the averments of paragraph 1 thereof except that plaintiff seeks to invoke the jurisdiction of this Court as averred therein.

2. Deny the averments of paragraph 2 thereof except that LIRR and MTA are authorized to and do business in this district and that LIRR is a wholly-owned subsidiary of MTA.

3. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 3 thereof except that plaintiff has been certified by the National Mediation Board as the exclusive collective bargaining representative for certain employees of LIRR, and except that there are collective bargaining agreements between plaintiff and LIRR, and respectfully refer the Court to those agreements for the terms thereof, which agreements have in the past been negotiated and maintained pursuant to the Railway Labor Act which defendants aver no longer applies.

4. Deny the averments of paragraph 4 thereof except that LIRR is a public benefit corporation organized and existing under the laws of the State of New York and interchange freight with railroads engaged in interstate commerce, and avers that the other averments of paragraph 4 thereof are conclusions of law as to which they are not required to plead.

5. Deny the averments of paragraph 5 thereof except that LIRR is a wholly owned subsidiary of MTA.

6. Deny the averments of paragraphs 6, 9, 10 and 11 thereof as conclusions of law as to which they are not required to plead.

7. Deny the averments of paragraph 7 thereof except that plaintiff served written notices on LIRR of intended changes in its agreement with LIRR and respectfully refer the Court to those notices for their terms, and except that plaintiff and LIRR filed an application with the National Mediation Board and respectfully refer the Court to that application for its terms, and except that, on information and belief, the National Mediation Board advised plaintiff concerning its mediation effort, and except that after a strike by plaintiff and its members began on December 8, 1979, a Presidential Emergency Board was appointed, and avers that the other averments of paragraph 7 thereof are conclusions of law as to which they are not required to plead.

8. Deny the averments of paragraph 8 thereof except that plaintiff and LIRR continued to negotiate their dispute after the termination of mediation.

9. Deny the averments of paragraphs 13 and 14 thereof.

FIRST DEFENSE

10. The verified complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

11. LIRR is a public benefit corporation of the State of New York.

12. By reason thereof, the New York Civil Service Law §§ 200-214 applies to LIRR and its employees.

13. Congress, when it enacted the Railway Labor Act in 1926, could not have intended that Act to apply to an intrastate commuter railroad such as LIRR.

14. By reason thereof, the Railway Labor Act does not apply to the LIRR.

15. By reason thereof, the verified complaint herein should be dismissed.

THIRD DEFENSE

16. Defendants repeat the averments of paragraph 11 hereof.

17. Commuter passenger transportation is a vital and traditional concern of the State of New York and its governmental subdivisions.

18. The LIRR is essentially a passenger railroad providing intrastate commuter service into and out of New York City and is heavily subsidized by the State of New York.

19. The operation of LIRR constitutes a vital governmental function of the State of New York, and the State of New York has a vital interest both in continuing this function without interruptions and in the terms of employment of the employees of the LIRR.

20. By reason thereof, the verified complaint herein should be dismissed.

WHEREFORE, defendants demand judgment dismissing the complaint herein, awarding them their costs of this action and awarding them such other and further relief as the Court may find proper.

New York, New York
February 19, 1980

/s/ Thomas Taranto
THOMAS TARANTO
Attorney for Defendant
The Long Island Rail Road
Jamaica Station
Jamaica, New York 11435

SEWARD & KISSEL
By /s/ Anthony R. Mansfield
A Member of the Firm
Attorneys for Defendant
Metropolitan Transportation
Authority
63 Wall Street
New York, New York 10005

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

79 Civ 3118
Jacob Mishler

UNITED TRANSPORTATION UNION
(EDWARD YULE, JR., Its General Chairman),
*Plaintiff*,

—against—

LONG ISLAND RAIL ROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,
*Defendants.*

---

**AFFIDAVIT OF EDWARD YULE, JR.**

STATE OF NEW YORK )
) ss:
COUNTY OF NEW YORK )

1. EDWARD YULE, JR., being duly sworn, deposes and says:

2. I am the General Chairman of the UNITED TRANSPORTATION UNION ("UTU") the plaintiff herein.

3. This affidavit is submitted in support of the instant motion for the reliefs requested herein.

4. Your affiant has been told by representatives of the LONG ISLAND RAIL ROAD that their legal status has been changed from that of a public benefit subsidiary corporation to that of a public benefit corporation.

5. Your affiant wishes to inform the Court of the following history of the present contract negotiations as they relate to the UTU's seeking self help under the

Railway Labor Act. On December 8, 1979, at 12:01, the UTU struck the LONG ISLAND RAIL ROAD. Said strike continued until December 14, 1979 at which time, under the Railway Labor Act, President Jimmy Carter invoked the sanctions of said Legislation and created an Emergency Presidential Board to investigate the dispute between the LONG ISLAND RAIL ROAD and the UTU as well as other unions that had struck during said period. Under the Legislation scheme for said Emergency Presidential Board, a fact finding was held in Washington, D. C. before a three-man board. Said Board rendered its decision to the President on January 14, 1980. Since the publishing of the Emergency Presidential Board's finding, negotiations have continued and presently are being conducted in New York City, with the voluntary assistance of the National Mediation Board.

6. Pursuant to the Railway Labor Act, the strike that had been in progress during the period December 8 to December 14 was enjoined for a 60-day period. As the General Chairman of the UTU, I have publically announced both to the management negotiations team and to the news media that if a fair and equitable contract cannot be agreed upon prior to February 14, 1980 at 12:01 that I will resume the strike previously enjoined.

7. Your affiant was a union representative in 1977 when the METROPOLITAN TRANSIT AUTHORITY and the LONG ISLAND RAIL ROAD invoked the Taylor Law during a strike of the UTU by going to State Supreme Court, Queens County and obtaining a temporary restraining order enjoining a strike. Additionally, the news media has reported that Mr. Ravitch, Chairman of the Board of the METROPOLITAN TRANSIT AUTHORITY had gone to Governor Carey in order to have him put the LONG ISLAND RAIL ROAD under the Taylor Law. Governor was reported to have instructed Mr. Ravitch to file the Certificate under the Public Authority Law to make the LONG ISLAND RAIL ROAD a public benefit corporation.

8. Furthermore, your affiant has been informed by his counsel that the LONG ISLAND RAIL ROAD and METROPOLITAN TRANSIT AUTHORITY had made a motion to dismiss the subject declaratory judgment in this Court. The reason stated in said papers was that the LONG ISLAND RAIL ROAD did not come under the Taylor Law as it was then legally constructed as a public benefit subsidiary corporation. Once the Certificate was filed to create the LONG ISLAND RAIL ROAD as a public benefit corporation, the LONG ISLAND RAIL ROAD and the METROPOLITAN TRANSIT AUTHORITY withdrew their motion to dismiss the declaratory judgment. The reason given by the LONG ISLAND RAIL ROAD and METROPOLITAN TRANSIT AUTHORITY was because now the UTU was under the Taylor Law, in their opinion.

9. Due to all this activity by the METROPOLITAN TRANSIT AUTHORITY and LONG ISLAND RAIL ROAD the defendant has invoked Taylor Law sanctions against the UTU if it should seek to use self help under the Railway Labor Act, which has controlled the subject negotiations up until this time. The invoking of the Taylor Law by the LONG ISLAND RAIL ROAD and METROPOLITAN AUTHORITY caused irreparable harm to the members of the UTU in that management would be able to further prolong the contract negotiations. The self help provisions of the Railway Labor Act is the only effective means and leverage that Labor has to compel management to earnestly and expeditiously address and resolve Labor's needs and demands. Confirming this fact is that without the threat or the ability of Labor to strike under the Railway Labor Act until they were released by the Mediation Board, management did not propose any meaningful economic package to settle the contract and they did not even discuss work rule changes requested by Labor. In fact, twelve months were consumed from the expiration of the prior contract be-

tween Labor and management until the National Mediation Board, under the Railway Labor Act, released the Unions to seek self help. During that time, no meaningful negotiations were conducted by management. It is your affiant's belief, and it has been his experience, that without the ability to strike and Labor's opting to use said strike authority, management has not earnestly negotiated the present contract.

10. Recently the Interstate Commerce Commission (ICC) had before it a matter involving the Staten Island Rapid Transit Operating Authority (SIRTOA) wherein MTA claimed that SIRTOA was not a carrier subject to the Interstate Commerce Act. SIRTOA was at that time, and still is, a public benefit subsidiary corporation of MTA.

11. The ICC, in a decision rendered on November 8, 1979, decided that SIRTOA was a carrier subject to the Interstate Commerce Act, despite the fact that it was and still is a public benefit corporation.[1] Said decision is attached hereto, made part hereof as if herein set forth and marked Exhibit "A".

12. I do not deal herein with form, as the defendant is attempting to do in this matter, but shall deal with the federal interstate commerce character of the LONG ISLAND RAIL ROAD (LIRR) which is not changed by the defendant's attempts to transform the LIRR from a stock corporation to a public benefit corporation.

13. Since my initial employment with the LIRR, I have been a member of the UTU which represents all train crew employees employed by the LIRR, numbering approximately 1,500 employees.

14. In the course of my employment with LIRR I have observed that the LIRR hauls freight for consignors

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[1] Brotherhood of Locomotive Engineers et al v. Staten Island Rapid Transit Operating Authority Finance Docket No. 29011 decided November 8, 1979.

and to consignees throughout the length and breadth of the United States and Canada. The freight hauled included, among other things, coal, building materials, chemicals, heavy machine equipment, aircraft parts, radioactive materials, paper products, electronic parts, petroleum, farm products, and so forth.

15. Freight cars of the following interstate rail carriers have been hauled by LIRR in transporting the aforementioned freight, both during the period prior to 1966, and continuing up to the present time:

Atchison, Topeka and Santa Fe Railroad
The Southern Railroad Company
Florida, East Coast Railroad Company
Reading Railroad Company
Jersey Central Railroad Company
Main Central Railroad Company
Great Northern Railroad Company
Union Pacific Railroad Company
Penn Central Railroad Company (ConRail)
Norfolk and Western Railroad Company
Canadian and Pacific Railroad Company
Canadian National Railroad Company
Erie Lackawanna Railroad Company
Chicago Northwestern Railroad Company
Burlington Railroad Company

16. Freight cars owned by these and other interstate rail carriers are continuously being used on the LIRR property. At any given time, approximately 1,000 freight cars owned by other interstate rail carriers are in transit on LIRR trackage. In addition to other carrier's freight cars, the LIRR itself owns and operates approximately 80 diesel locomotives, over 900 electric passenger cars and approximately 200 diesel hauled passenger cars.

17. The freight customers located on Long Island, serviced by the LIRR, include aircraft manufacturers, farms, supermarket chains, mine operators, food processors, hospitals, public utilities, building suppliers, etc. The

LIRR serves these freight customers at four major freight terminals, over approximately 350 miles of trackage, and approximately 250 freight sidings located throughout the 4 counties of Long Island.

18. The LIRR provides engine services for freight trains delivered to it by other interstate carriers at interchange points located at the Fremont Yard area in Queens County, which is owned and operated by Consolidated Rail Corporation (Conrail); and at Sunnyside Yard, also located in Queens County, which is owned and operated by Amtrack and Penn Central Railroads. Additionally, the LIRR makes daily use of tunnels and station facilities and services of Pennsylvania Station in New York City, which are owned and operated by Amtrak.

19. The LIRR is the only rail common carrier and the only provider of rail freight services located in Nassau and Suffolk Counties and is the principal rail freight carrier servicing Queens and Kings Counties. As a consequence of this unique position in these four counties, the LIRR provides the only link into the interstate freight rail system for major freight customers on Long Island. For the calendar year 1978, the revenue produced for the LIRR from its freight service totalled over $32,023,000 out of $255,453,000.

20. In executing its responsibilities as a common carrier by railroad, it is required to comply with a variety of federal statutes, enforced by the Interstate Commerce Commission, such as:

Federal Locomotive Inspection Act
Hours of Service Act
Boiler Inspection Act
Safety Appliance Act
Hazardous Material Act
Accident Reports Act
Power Brake Law
Federal Employees Liability Act, etc.

21. Pursuant to various federal rules and regulations, the LIRR is required to undertake a variety of tests and inspections on its equipment, including, but not limited to, monthly inspections of diesel locomotives used in freight and passenger service; 48 hour inspections of diesel locomotives in yard service, air pressure tests on braking systems, operational brake tests, boiler tests, etc. All these tests are made by employees of the LIRR. In addition, federal inspectors employed by the United States Department of Transportation conduct tests of the LIRR tracks, cars, signals, etc. on the LIRR property and are empowered to order such equipment out of service.

21. The LIRR employs approximately 2,000 operating employees as trainmen, conductors, brakemen and engineers. Approximately 200 of these employees are employed in freight service. An additional 4,500 employees are employed in non-operating classifications, such as maintenance employees, block operators, security personnel, clerks, etc.

22. I am informed that LIRR has consistently taken the position in litigation that it "is a common carrier by railroad engaged in interstate commerce and, as such, is subject to the provisions of the Interstate Commerce Act, the Railway Labor Act, the Federal Employers Liability Act, and all other federal legislation regulating or affecting common carriers by railroad engaged in interstate commerce".[2]

23. This Court should take judicial notice that Federal grants, well in excess of a half billion dollars, have been received by LIRR for purposes of operating both its passenger and freight services in interstate commerce in the past four years.

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[2] See page 3 of LIRR memo in opposition to petition to Remand in Mills v. Long Island Rail Road Co., U.S. District Court for the Eastern District of New York, Civil Action No. 74 C 842.

24. Both prior to and after the MTA acquired LIRR, bargaining disputes and grievance matters have been handled under the provisions of the Railway Labor Act. Thus, in order to change or amend existing contracts, the parties have served so-called Section 6 Notices, which are denoted as such since required by Section 6 of the Railway Labor Act. Existing collective bargaining agreements between the parties refer to and incorporate the requirements and procedures of the Railway Labor Act. For example Article 56 of the March 31, 1978 agreement between UTU and LIRR provides:

> "This Agreement supersedes all previous Agreements, understandings, and practices however established, with which it is in conflict and shall continue in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended."

25. Under the Railway Labor Act, railroad employees are classified and uniqnized according to crafts and classes. The craft distinctions and designations are made by the National Mediation Board (NMB). UTU was certified as bargaining agent by the NMB for the LIRR train crew employed by LIRR.

26. UTU and all the other unions on the property of the LIRR and the LIRR have always carried on all aspects of labor management relations exclusively within the framework of the Railway Labor Act.

27. Beginning in mid-1978, and continuing in 1979, the above-named unions, pursuant to Section 6 of the Railway Labor Act, individually served on the railroad, notices of demands to amend numerous provisions of their Collective Bargaining Agreements with the plaintiff.

28. On June 29, 1978, November 1 and 15, 1978, December 15, 1978, and February 16, 1979, plaintiff served Section 6 Notices requesting a number of changes in the current Collective Bargaining Agreements.

29. On April 5, 1979, the plaintiff invoked mediation service of the National Mediation Board in relation to the Section 6 Notices served by it.

30. NMB determined that the parties were in fact dead-locked and pursuant to the Federal Railway Labor Act proffered arbitration. The parties did not agree to go to arbitration. As a result, again pursuant to the Federal Railway Labor Act, the NMB released the parties from mediation on November 7, 1979 and the statutory 30-day "Status Quo" began to run.

31. On December 8, 1979, UTU lawfully restored to self-help and struck the LIRR.

32. On December 14, 1979, President Carter, by Executive Order No. 12170, pursuant to Section 10 of the Railway Labor Act, created an Emergency Board because the President had been informed by the NMB that in the judgment of the NMB the existence of a strike on the LIRR threatened substantially to interrupt interstate commerce. As a result of the creation of this Board, the strike called by the UTU was called off in compliance with the Federal Railway Labor Act.

33. On January 14, 1980, the Emergency Board, following its investigation of the issues in dispute and after having held formal hearings on the record and informal meetings with the parties, submitted its report to the President.

34. This Board, in its decision, stated, among other things, "the Long Island Rail Road Company is a Class 1 railroad subject to the jurisdiction of the Interstate Commerce Commission and the provisions and procedures of the Railway Labor Act."

35. All of the above steps were taken by all parties pursuant to the requirements and provisions of the Federal Railway Labor Act.

36. I have been informed that a similar situation as is now before this Court, was before Judge JACK B. WEINSTEIN in the United States District Court for the Eastern District of New York in the matter of *MTA* v. *UTU* (77 C 2358). In that case my union had threatened to strike and the MTA and LIRR attempted to enjoin that strike on the ground that the LIRR employees were subject to the Taylor Act. Harold Tompkins, the Assistant Attorney General, who appears in this case, appeared in that case on behalf of the Attorney General of the State of New York, as attorney for the plaintiff in that action. That case was removed from the State Court to the Federal Court by the UTU.

37. The Attorney General in that case moved, as it now does in this case, to remand to the State Court. Judge Weinstein denied the petition to remand stating, among other things, that the Court had no alternative but to accept jurisdiction.

38. The Court stated "It has no power to remand".

39. The Court further stated, in support of its decision: "It does seem to me that although the complaint is artfully framed to avoid a federal question, that on the basis of judicial notice the court cannot avoid the conclusions that the complaint implicitly involves a serious federal question". Attached hereto and made part hereof as if herein set forth in full and marked Exhibit "B" is a pertinent excerpt from the Minutes before Judge Jack B. Weinstein.

40. Annexed hereto and marked Exhibit "C" are excerpts covering LIRR derived from Moody's Transportation Manual and from the R-1 Annual Reports filed by LIRR with the Interstate Commerce Commission for the year 1978. Also attached as part of this exhibit is a photostatic copy of Opinion Letter of September 17, 1979 issued by the Wage-Hour Administration of the U.S.

Department of Labor published as para. 31,289 at p. 392 of the Commerce Clearing House Wage-Hour Service.

41. The eminence of the State Court action in seeking an injunction versus my union and myself requires expeditious consideration by this Court through the use of an order to show cause with a stay and not by the regular procedure of a normal motion.

42. A prior application sought by plaintiff for a temporary restraining order in this Court was denied by Judge Mishler without prejudice to renewal.

43. No previous application has been made for the relief sought herein to any Court or Judge except as hereinabove set forth.

WHEREFORE, your deponent respectfully requests that the instant motion be granted.

/s/ Edward Yule, Jr.
EDWARD YULE, JR.

Sworn to before me this
27th day of February, 1980

/s/ IAN JAY GURA
Notary Public
State of New York
No. 31-1605912
Qualified in New York County
Commission Expires March 30, 1981

# 1978 ANNUAL REPORT TO THE INTERSTATE COMMERCE COMMISSION BY THE LONG LSLAND RAILROAD COMPANY, EXCERPT OF OPERATING INCOME

## 210. RESULTS OF OPERATIONS

1. Disclose the requested information for the respondent pertaining in the results of operations for the year.

2. Report total operating expenses from Schedule 410 of this report. Any disparities in expense amounts shown in this schedule and expense amounts reported in Schedule 410 must be fully explained.

3. List dividends from investments accounted for under the cost method on the appropriate line for Account No. 513. "Dividend income." List dividends accounted for by the equity method on the appropriate dividend line under "Income from Affiliated Companies" subsection of this schedule.

4. All contra entries hereunder should be indicated in parenthesis.

5. Report dollars in thousands.

| Line No. | | Item | Amount for Current Year | Amount for Preceding Year | Freight-Related Revenues & Expenses | Passenger-Related Revenues & Expenses |
|---|---|---|---|---|---|---|
| | | (a) | (b) | (c) | (d) | (e) |
| | | **ORDINARY ITEMS OPERATING INCOME** | | | | |
| | | **Railway Operating Income** | | | | |
| 1 | (101) | Freight ** | $ 17,543 | N | $17,543 | $ |
| 2 | (102) | Passenger ** | 118,891 | | | 118,891 |
| 3 | (103) | Passenger-Related | 1,884 | O | | 1,884 |
| 4 | (104) | Switching | 2 | | 2 | |
| 5 | (105) | Water Transfers | | | | |
| 6 | (106) | Demurrage | 790 | T | 790 | |
| 7 | (110) | Incidental | 1,439 | | 24 | 1,415 |
| 8 | (121) | Joint Facility-Credit | | | | |
| 9 | (122) | Joint Facility-Debit | | | | |
| 10 | (501) | Railway operating revenues (Exclusive of transfers from Government Authorities) | 140,549 | | 18,359 | 122,190 |
| 11 | (502) | Railway operating revenues-Transfers from Government Authorities for current operations | 114,904 | | 13,664 | 101,240 |
| 12 | (503) | Railway operating revenues-Amortization of deferred transfers from Government Authorities | | A | | |
| 13 | | Total railway operating revenues (lines 10-12) | 255,453 | | 32,023 | 223,430 |
| 14 | (531) | Railway operating expenses | 304,929 | V | 32,553 | 272,376 |
| 15 | | * Net revenues from railway operations | (49,476) | | (530) | (48,946) |
| | | **OTHER INCOME** | | A | | |
| | | * * * * | | | | |

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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79 Civ 3118
Jacob Mishler

UNITED TRANSPORTATION UNION
(EDWARD YULE, JR., its General Chairman),
*Plaintiff*,

—against—

LONG ISLAND RAILROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,
*Defendants*.

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**AFFIDAVIT OF THOMAS P. MOORE**

STATE OF NEW YORK )
) ss.:
COUNTY OF QUEENS )

THOMAS P. MOORE, being duly sworn, deposes and says:

1. I am the Senior Executive—Administration of defendant, The Long Island Rail Road Company (LIRR). I have been employed by LIRR for over 27 years and am fully familiar with its finances and financial records, all of which are maintained under my overall supervision.

2. LIRR is essentially a commuter railroad, all of whose trackage and trackage rights lie within the counties of New York, Kings, Queens, Nassau and Suffolk, and whose main purpose is the transportation of commuters between their homes on Long Island and their jobs in New York City. On an average weekday, LIRR

carries over 260,000 passengers, the bulk of which consists of about 90,000 commuters making two trips each. While LIRR still handles a small amount of freight, the freight end of the operation has diminished in relation to the passenger operation over the years to the point where it is now virtually insignificant when compared to the passenger operation. For example, 1979 estimates indicate that freight revenues amounted to $13,000,000 while passenger revenues amounted to $137,000,000. Thus, freight revenues accounted for only 8.7% of total revenue (not including subsidies). This is in stark contrast to the average percentage of freight revenue to aggregate revenue of all Class I Railroads of 96.9% (for the first 9 months of 1979). Indeed, over the last 13 years, the industry average percent of freight revenue to aggregate climbed slightly from 95% in 1967 to 96.9% in 1979, whereas the LIRR percentage has dropped from 11.9% in 1967 to 8.7% in 1979. Attached hereto as Exhibit A is a comparison of the ratio of freight revenues to aggregate passenger and freight revenues between the LIRR and Class I Railroads in the United States.

3. While the LIRR's percent of revenue attributable to freight never approached the industry average, it was substantially higher in the past, amounting to 31.7% in 1926, 26.2% in 1936, 31.7% in 1947, and 22.6% in 1956. This corresponds to a greatly reduced number of freight cars handled over the years. In 1926, LIRR handled 290,315 cars, whereas in 1979 LIRR handled an estimated 40,936 cars, about 4,100 of which involved shipments originating and terminating wholly within the State of New York. In 1926, the ratio of revenue freight car miles to passenger car miles was 15.7%, whereas in 1979 it was a miniscule 2.1%. The continual drop off of freight business is shown in more detail in Exhibit B attached hereto entitled "Selected Years Freight Statis-

tics 1926 to 1979," Exhibit B-1 attached hereto entitled "The Long Island Rail Road Company Selected Years Summary of Income 1926-1979 from Form R-1 Annual Report," and Exhibit B-2 entitled "The Long Island Rail Road Company Summary of Income for Years 1960 through 1979 Form R-1 Schedule 300."

4. LIRR runs at a substantial deficit and is heavily dependent upon state subsidies for its continued operation. (See accompanying affidavit of James B. Huff.) Indeed, in 1979 its payroll alone amounted to 100% of its gross revenues. Set forth below is a schedule of LIRR's total deficit and total operating subsidies, from all sources, received through its parent, Metropolitan Transportation Authority (MTA) for the years 1975 through 1979:

| Year | Total Deficit Before Subsidy | Total Operating Subsidy |
|---|---|---|
| 1975 | $128,560,000 | $113,796,000 |
| 1976 | 120,414,000 | 90,335,000 |
| 1977 | 121,566,000 | 94,789,000 |
| 1978 | 164,779,000 | 114,904,000 |
| 1979 | 189,300,000 | 150,670,000 |

Since MTA acquired all the stock of LIRR from the Pennsylvania Railroad Company in 1966 for $65,000,000, the total operating and capital subsidies from all sources received by LIRR through MTA has now exceeded $1 billion.

5. One of the purposes of MTA is to implement a unified mass transportation policy for the area embracing the City of New York and the counties of Duchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester. To this end, steps have been taken to integrate the LIRR passenger service with that provided by various intra-state mass transit systems. For example, the LIRR sells "Uni-Tickets" which are combination tickets which entitle the rider to use the LIRR and various bus

services which interconnect with LIRR stations on a single ticket. Such arrangements are now in effect with the Metropolitan Suburban Bus Authority, an MTA subsidiary providing local bus service in Nassau and Suffolk Counties, the Huntington Area Rapid Transit (HART), a Town operated bus service within the Town of Huntington, Suffolk County and with the New York City Transit Authority (NYCTA) with respect to certain bus service in Queens County. In addition, LIRR sells tokens for use on the facilities of NYCTA, subway connections being readily available at the major New York City terminals of LIRR.

/s/ Thomas P. Moore
THOMAS P. MOORE

Sworn to before me this
29th day of February, 1980

/s/ Roger J. Schiera
ROGER J. SCHIERA
Notary Public
State of New York
No. 41-4614730
Qualified in Queens County
Commission Expires March 30, 1981

[SEAL]

## EXHIBIT "A"

### THE LONG ISLAND RAIL ROAD COMPANY RATIO OF FREIGHT REVENUES TO AGGREGATE PASSENGER AND FREIGHT REVENUES L.I.R.R. COMPARED WITH CLASS I RRs IN U.S.

### PERCENT FREIGHT REVENUE TO AGGREGATE PASSENGER AND FREIGHT REVENUE

| Year | L.I.R.R. | Class I RRs |
|---|---|---|
| 1967 | 11.9 | 95.0 |
| 1968 | 11.5 | 95.6 |
| 1969 | 11.3 | 95.9 |
| 1970 | 10.9 | 96.3 |
| 1971 | 10.9 | 96.5 |
| 1972 | 9.7 | 96.9 |
| 1973 | 10.2 | 96.8 |
| 1974 | 10.2 | 96.5 |
| 1975 | 8.6 | 96.4 |
| 1976 | 9.1 | 96.5 |
| 1977 | 8.7 | 96.7 |
| 1978 | 8.4 | 97.0 |
| 1979 (Estimated) | 8.7 | 96.9 |

NOTE: Computed as to Class I RRs from information furnished by the Association of American Railroads. 1979 percent of 96.9 represents the actual for nine (9) months.

## EXHIBIT "B"

## THE LONG ISLAND RAIL ROAD COMPANY

## SELECTED YEARS FREIGHT STATISTICS

### 1926 to 1979

| Year | No. of Frt. Cars Handled | No. of Frt. Tons Handled | No. of Revenue Frt. Car Miles | Frt. Rev. Per Car | Frt. Rev. Per Ton | Mo. of Tons Per Car | No. of Passengers Carried | No. of Passenger Miles | Passenger Car Miles |
|---|---|---|---|---|---|---|---|---|---|
| 1926 | 290,315 | 9,038,716 | 7,438,107 | $ 40.17 | $1.29 | 31 | 104,794,222 | 1,637,595,920 | 47,517,439 |
| 1936 | 174,992 | 5,235,131 | 3,896,159 | 37.60 | 1.26 | 30 | 82,278,859 | 1,393,130,428 | 43,655,524 |
| 1947 | 261,043 | 8,086,312 | 5,127,129 | 56.05 | 1.81 | 31 | 112,802,144 | 2,130,093,471 | 54,337,774 |
| 1956 | 176,970 | 5,280,645 | 3,137,452 | 79.91 | 2.68 | 30 | 75,276,990 | 1,622,296,617 | 48,258,261 |
| 1966 | 113,965 | 4,163,380 | 2,162,112 | 82.72 | 2.26 | 37 | 73,654,536 | 1,776,623,806 | 46,633,226 |
| 1976 | 53,417 | 2,420,816 | 1,110,000 | 208.39(1) | 4.60 | 45 | 67,363,724 | 1,872,908,162 | 56,926,000 |
| 1979(Est) | 40,936 | 2,072,142 | 1,148,000 | 300.15(2) | 5.93 | 51 | 77,377,623 | 2,161,330,606 | 54,574,000 |

(1) Based on Freight Revenue less Freight Surcharge applicable to Passenger Service $6,887M.

(2) Based on Freight Revenue less Freight Surcharge applicable to Passenger Service $7,087M.

THE LONG ISLAND RAIL ROAD COMPANY
SELECTED YEARS SUMMARY OF INCOME 1926 TO 1979
FROM FORM R-1 ANNUAL REPORT
(DOLLARS IN THOUSANDS)

| | | Percent of Revenue | Railway Operating Revenue | Railway Operating Expense | Railway Tax Accruals | Net Rents | Total Railway Operating Expense | Railway Operating Deficit | Total Other Income | Total Misc. Deductions | Total Fixed Charges | Total Non-Operating Income (Expense) | Transferred to Retained Income |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 5 | Freight | 31.7 | $ 12,570 | $ 9,706 | $ 720 | $ | $ | $ | $ | $ | $ | $ | $ |
| | Passenger | 68.3 | 27,071 | 19,310 | 1,433 | | | | | | | | |
| | Total | 100.0 | $ 39,649 | $ 29,016 | $ 2,152 | $2,649 | $ 33,817 | $ 5,832 | $ 791 | $ 259 | $3,220 | $(2,688) | $ 3,144 |
| 6 | Freight | 26.2 | $ 6,693 | $ 4,194 | $ 703 | $ (332) | $ 4,765 | $ 1,928 | $ | $ | $ | $ | $ |
| | Passenger | 73.8 | 18,832 | 15,[illegible] | 2,436 | 2,305 | 19,963 | (1,131) | | | | | |
| | Total | 100.0 | $ 25,525 | $ 19,616 | $ 3,139 | $1,973 | $ 24,728 | $ 797 | $ 373 | $ 242 | $2,086 | $(1,955) | $ (1,158 |
| 7 | Freight | 31.7 | $ 15,156 | $ 11,914 | $ 1,641 | $1,968 | $ 15,523 | $ (367) | $ | $ | $ | $ | $ |
| | Passenger | 68.3 | 32,627 | 28,695 | 3,953 | 1,802 | 34,450 | (1,823) | | | | | |
| | Total | 100.0 | $ 47,783 | $ 40,609 | $ 5,594 | $3,770 | $ 49,973 | $ (2,190) | $ 414 | $ 117 | $2,103 | $(1,806) | $ (3,996 |
| 8 | Freight | 22.6 | $ 14,572 | $ 10,823 | $ 793 | $1,997 | $ 13,613 | $ 959 | $ | $ | $ | $ | $ |
| | Passenger | 77.4 | 49,950 | 44,706 | 3,277 | 1,028 | 49,011 | 939 | | | | | |
| | Total | 100.0 | $ 64,522 | $ 55,529 | $ 4,070 | $3,025 | $ 62,624 | $ 1,898 | $ 487 | $ 136 | $1,433 | $(1,082) | $ [illegible] |
| 9 | Freight | 11.8 | $ 9,379 | $ 11,430 | $ 693 | $2,125 | $ 14,248 | $ (4,869) | $ | $ | $ | $ | $ |
| | Passenger | 88.2 | 69,991 | 64,503 | 3,915 | 1,036 | 69,454 | 537 | | | | | |
| | Total | 100.0 | $ 79,370 | $ 75,933 | $ 4,608 | $3,161 | $ 83,702 | $ (4,332) | $ 645 | $ 121 | $ 343 | $ 181 | $ (4,35 |
| 76 | Freight | 5.4 | $ 11,975 | $ 23,859 | $ 1,757 | $2,846 | $ 28,462 | $(16,487) | $ | $ | $ | $ | $ |
| | Passenger | 53.9 | 119,395 | 202,285 | 14,895 | 4,799 | 221,979 | (102,584) | | | | | |
| | Subsidy | 40.7 | 90,335 | - | - | - | - | 90,335 | | | | | |
| | Total | 100.0 | $221,705 | $226,144 | $16,652 | $7,645 | $250,441 | $(28,736) | $2,243 | $ 520 | $3,066 | $(1,343) | $ (30,679 |
| 79 | Freight | 4.3 | $ 13,000 | $ 33,300 | $ 2,300 | $2,300 | $ 37,900 | $(24,900) | $ | $ | $ | $ | $ |
| | Passenger | 45.6 | 137,000 | 277,700 | 18,700 | 4,700 | 301,100 | (164,100) | | | | | |
| | Subsidy | 50.1 | 150,670 | - | - | - | - | 150,670 | | | | | |
| | Total (est.) | 100.0 | $300,670 | $311,000 | $21,000 | $7,000 | $339,000 | $(38,330) | $1,500 | $ (900) | $2,700 | $ (300) | $ (38,53 |

The accompanying notes are an integral part of this statement.

EXHIBIT "B-1"

Best Copy Available

THE LONG ISLAND RAIL ROAD COMPANY
SELECTED YEARS SUMMARY OF INCOME 1926 TO 1979
(DOLLARS IN THOUSANDS)

NOTES:

1. The figures provided for 1979 have been estimated.

2. In compliance with a Statement of Position on Inter-Governmental Transfers of Funds issued by the American Institute of Certified Public Accountants and an order of The Interstate Commerce Commission, commencing with the year ended December 31, 1978, the Company records operating subsidies received from the MTA as credits to operations. The Company's prior practice was to credit such funds to capital contributions. Therefore, the 1976 Income Statement has been reclassified to record operating subsidies received from the MTA as credits to operations.

Railway Operating Revenues include Freight Surcharge as follows:

| Year | Freight | Passenger | Total |
|---|---|---|---|
| 1976 | $806 | $6,837 | $7,643 |
| 1979 | 849 | 7,087 | 7,936 |

EXHIBIT "B-1" (cont'd)

THE LONG ISLAND RAIL ROAD COMPANY
SUMMARY OF INCOME FOR YEARS 1960 THROUGH 1979
FORM R-1 SCHEDULE 300
(DOLLARS IN THOUSANDS)

| | Percent of Revenue | Railway Operating Revenue | Railway Operating Expense | Railway Tax Accruals | Net Rents | Total Railway Operating Expenses | Railway Operating Deficit | Total Other Income | Total Misc. Deductions | Total Fixed Charges | Total Non-Operating Income (Expense) | Transferred to Retained Income |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Freight | 17.0 | $10,879 | $ 9,588 | $ 786 | $1,532 | $11,906 | $(1,027) | $ | $ | $ | $ | $ |
| Passenger | 83.0 | 53,126 | 48,946 | 4,016 | 858 | 53,820 | ( 694) | | | | | |
| Total | 100.0 | $64,005 | $58,534 | $4,802 | $2,390 | $65,726 | $(1,721) | $1,800 | $260 | $ 919 | $ 581 | $ [illegible] |
| Freight | 14.7 | $10,288 | $10,787 | $ 766 | $1,406 | $12,959 | $(2,671) | $ | $ | $ | $ | $ |
| Passenger | 85.3 | 59,637 | 51,779 | 3,678 | 514 | 55,971 | 3,666 | | | | | |
| Total | 100.0 | $69,925 | $62,566 | $4,444 | $1,920 | $68,930 | $ 995 | $ 571 | $157 | $ 422 | $ [illegible] | $ [illegible] |
| Freight | 15.3 | $11,173 | $11,216 | $ 673 | $1,633 | $13,522 | $(2,349) | $ | $ | $ | $ | $ |
| Passenger | 84.7 | 61,762 | 52,877 | 3,172 | 795 | 56,844 | 4,918 | | | | | |
| Total | 100.0 | $72,935 | $64,093 | $3,845 | $2,428 | $70,366 | $ 2,569 | $ 503 | $104 | $ 694 | $ [illegible] | $ [illegible] |
| Freight | 14.1 | $10,583 | $10,892 | $ 634 | $1,468 | $12,994 | $(2,411) | $ | $ | $ | $ | $ |
| Passenger | 85.9 | 64,384 | 56,600 | 3,292 | 1,366 | 61,258 | 3,126 | | | | | |
| Total | 100.0 | $74,967 | $67,492 | $3,926 | $2,834 | $74,252 | $ 715 | $ 564 | $ 59 | $ 534 | $ [illegible] | $ [illegible] |
| Freight | 12.5 | $ 9,791 | $10,700 | $ 625 | $1,553 | $12,878 | $(3,087) | $ | $ | $ | $ | $ |
| Passenger | 87.5 | 66,701 | 62,139 | 3,628 | 1,801 | 67,568 | 1,133 | | | | | |
| Total | 100.0 | $76,492 | $72,839 | $4,253 | $3,354 | $80,446 | $(1,954) | $ 309 | $ 60 | $ 441 | $ [illegible] | $ [illegible] |
| Freight | 12.8 | $10,125 | $11,286 | $ 685 | $1,668 | $13,639 | $(3,514) | $ | $ | $ | $ | $ |
| Passenger | 87.2 | 68,997 | 61,942 | 3,759 | 2,203 | 67,904 | 1,093 | | | | | |
| Total | 100.0 | $79,122 | $73,228 | $4,444 | $3,871 | $81,543 | $(2,421) | $ 379 | $ 84 | $ 354 | $ [illegible] | $ [illegible] |

EXHIBIT "B-2"

THE LONG ISLAND RAIL ROAD COMPANY
SUMMARY OF INCOME FOR YEARS 1960 THROUGH 1979
FORM R-1 SCHEDULE 300
(DOLLARS IN THOUSANDS)

| | | Percent of Revenue | Railway Operating Revenue | Railway Operating Expense | Railway Tax Accruals | Net Rents | Total Railway Operating Expense | Railway Operating Deficit | Total Other Income | Total Misc. Deductions | Total Fixed Charges | Total Non-Operating Income-(Expense) | Transfer to Retained Income |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 966 | Freight | 11.8 | $ 9,379 | $ 11,430 | $ 693 | $2,125 | $ 14,248 | $( 4,869) | $ | $ | $ | $ | $ |
| | Passenger | 88.2 | 69,991 | 64,503 | 3,915 | 1,036 | 69,454 | 537 | | | | | |
| | Total | 100.0 | $79,370 | $ 75,933 | $4,608 | $3,161 | $ 83,702 | $( 4,332) | $ 645 | $121 | $ 343 | $ 181 | $( 4,151) |
| 967 | Freight | 11.9 | $ 9,595 | $ 12,464 | $ 777 | $2,382 | $ 15,623 | $( 6,028) | $ | $ | $ | $ | $ |
| | Passenger | 88.1 | 71,171 | 70,335 | 4,389 | 1,299 | 76,023 | ( 4,852) | | | | | |
| | Total | 100.0 | $80,766 | $ 82,799 | $5,166 | $3,681 | $ 91,646 | $(10,880) | $ 796 | $ 46 | $ 291 | $ 459 | $(10,422) |
| 968 | Freight | 11.5 | $ 9,915 | $ 13,232 | $ 848 | $2,797 | $ 16,877 | $( 6,962) | $ | $ | $ | $ | $ |
| | Passenger | 88.5 | 76,174 | 76,090 | 4,803 | 1,416 | 82,309 | ( 6,135) | | | | | |
| | Total | 100.0 | $86,089 | $ 89,322 | $5,651 | $4,213 | $ 99,186 | $(13,097) | $ 986 | $186 | $ 273 | $ 527 | $(12,570) |
| 969 | Freight | 11.3 | $ 9,911 | $ 14,429 | $ 928 | $2,991 | $ 18,348 | $( 8,437) | $ | $ | $ | $ | $ |
| | Passenger | 88.7 | 77,946 | 87,444 | 5,427 | 1,327 | 94,198 | (16,252) | | | | | |
| | Total | 100.0 | $87,857 | $101,873 | $6,355 | $4,318 | $112,546 | $(24,689) | $ 703 | $ 86 | $ 127 | $ 490 | $(24,199) |
| 970 | Freight | 10.9 | $10,407 | $ 16,514 | $ 997 | $2,464 | $ 19,975 | $( 9,568) | $ | $ | $ | $ | $ |
| | Passenger | 89.1 | 85,188 | 102,501 | 6,021 | 1,854 | 110,376 | (25,188) | | | | | |
| | Total | 100.0 | $95,595 | $119,015 | $7,018 | $4,318 | $130,351 | $(34,756) | $1,639 | $761 | $3,937 | $(3,059) | $(37,815) |
| 971 | Freight | 10.9 | $10,427 | $ 18,829 | $ 973 | $2,327 | $ 22,129 | $(11,702) | $ | $ | $ | $ | $ |
| | Passenger | 89.1 | 85,641 | 117,035 | 5,980 | 3,498 | 126,513 | (40,872) | | | | | |
| | Total | 100.0 | $96,068 | $135,864 | $6,953 | $5,825 | $148,642 | $(52,574) | $1,406 | $110 | $3,460 | $(2,164) | $(54,738) |

THE LONG ISLAND RAIL ROAD COMPANY
SUMMARY OF INCOME FOR YEARS 1960 THROUGH 1979
FORM R-1 SCHEDULE 210
(DOLLARS IN THOUSANDS)

| | | Percent of Revenue | Railway Operating Revenue | Railway Operating Expense | Railway Tax Accruals | Net Rents | Total Railway Operating Expense | Railway Operating Deficit | Total Other Income | Total Misc. Deductions | Total Fixed Charges | Total Non-Operating Income (Expense) | Transfers to Retained Income |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1979 | Freight | 8.7 | $ 13,000 | $ 33,300 | $ 2,300 | $2,300 | $ 37,900 | $( 24,900) | $ | $ | $ | $ | $ |
| | Passenger | 91.3 | 137,000 | 277,700 | 18,700 | 4,700 | 301,100 | (164,100) | | | | | |
| | Total | 100.0 | *$150,000 | $311,000 | $21,000 | $7,000 | $339,000 | $(189,000) | $1,500 | $(900) | $[illegible] | $(300) | $(189,[illegible]) |

Notes:

1. The figures provided for 1979 have been estimated.

2. In compliance with a Statement of Position on Inter-Governmental Transfers of Funds issued by the American Institute of Certified Public Accountants and an Order of the Interstate Commerce Commission, commencing with the year ended December 31, 1978, the Company records operating subsidies received from the MTA as credits to operations. The Company's prior practice was to credit such funds to capital contributions. Therefore, the 1978 and 1979 Income Statements have been reclassified with respect to such items to conform to the prior year's treatment.

   The amount of operating subsidies received from the MTA in 1978 was $114,904,000; and the estimated amount for 1979 is $150,496,000.

   Railway Operating Revenues include Freight Surcharge as follows:

| Year | Freight | Passenger | Total |
|---|---|---|---|
| 1974 | $361 | $2,739 | $3,100 |
| 1975 | 680 | 5,444 | 6,124 |
| 1976 | 806 | 6,837 | 7,643 |
| 1977 | 767 | 6,757 | 7,524 |
| 1978 | 788 | 6,574 | 7,362 |
| 1979 | 849 | 7,087 | 7,936 |

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THE LONG ISLAND RAIL ROAD COMPANY
SUMMARY OF INCOME FOR YEARS 1960 THROUGH 1979
FORM R-1 SCHEDULE 300/210
(DOLLARS IN THOUSANDS)

| | | Percent of Revenue | Railway Operating Revenue | Railway Operating Expense | Railway Tax Accruals | Net Rents | Total Railway Operating Expense | Railway Operating Deficit | Total Other Income | Total Misc. Deductions | Total Fixed Charges | Total Non-Operating Income-(Expense) | Transfers to Retained Income |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| '72 | Freight | 9.7 | $ 9,190 | $ 17,639 | $ 894 | $2,119 | $ 20,652 | $(11,462) | $ | $ | $ | $ | $ |
| | Passenger | 90.3 | 85,122 | 129,055 | 5,960 | 4,612 | 139,647 | (54,525) | | | | | |
| | Total | 100.0 | $ 94,312 | $146,694 | $6,854 | $6,731 | $160,299 | $(65,987) | $6,015 | $ 24 | $3,380 | $ 2,591 | $(63,185) |
| '73 | Freight | 10.2 | $ 9,462 | $ 18,097 | $1,135 | $2,808 | $ 22,040 | $(12,578) | $ | $ | $ | $ | $ |
| | Passenger | 89.8 | 83,206 | 136,759 | 8,331 | 4,453 | 149,543 | (66,337) | | | | | |
| | Total | 100.0 | $ 92,668 | $154,856 | $9,466 | $7,261 | $171,583 | $(78,915) | $4,862 | $ 37 | $3,297 | $ 1,528 | $(77,317) |
| '74 | Freight | 10.2 | $ 11,233 | $ 22,907 | $ 1,654 | $3,318 | $ 27,779 | $(16,546) | $ | $ | $ | $ | $ |
| | Passenge | 89.3 | 98,702 | 173,294 | 12,566 | 4,513 | 190,373 | (91,671) | | | | | |
| | Total | 100.0 | *$109,935 | $196,101 | $14,220 | $7,831 | $218,152 | $(108,217) | $1,752 | $ 50 | $3,212 | $(1,510) | $(109,727) |
| '75 | Freight | 8.6 | $ 10,080 | $ 24,493 | $ 1,729 | $3,505 | $ 29,727 | $( 19,647) | $ | $ | $ | $ | $ |
| | Passenger | 91.4 | 107,347 | 196,174 | 13,847 | 4,521 | 214,542 | (107,195) | | | | | |
| | Total | 100.0 | *$117,427 | $220,667 | $15,576 | $8,026 | $244,269 | $(126,842) | $1,525 | $121 | $3,122 | $(1,718) | $(126,210) |
| '76 | Freight | 9.1 | $ 11,975 | $ 23,659 | $ 1,757 | $2,846 | $ 28,462 | $( 16,487) | $ | $ | $ | $ | $ |
| | Passenger | 90.9 | 119,395 | 202,285 | 14,895 | 4,799 | 221,979 | (102,584) | | | | | |
| | Total | 100.0 | *$131,370 | $225,944 | $16,652 | $7,645 | $250,441 | $(119,071) | $2,243 | $520 | $3,066 | $(1,343) | $(120,914) |
| '77 | Freight | 8.7 | $ 11,740 | $ 23,656 | $ 1,818 | $2,310 | $ 27,784 | $( 16,044) | $ | $ | $ | $ | $ |
| | Passenger | 91.3 | 123,321 | 208,016 | 15,983 | 4,487 | 228,496 | (105,165) | | | | | |
| | Total | 100.0 | *$135,061 | $231,672 | $17,801 | $6,797 | $256,270 | $(121,209) | $2,696 | $122 | $2,931 | $ (357) | $(121,566) |
| '78 | Freight | 8.4 | $ 11,785 | $ 28,072 | $ 2,057 | $2,424 | $ 32,553 | $( 20,768) | $ | $ | $ | $ | $ |
| | Passenger | 91.6 | 128,764 | 250,270 | 17,168 | 4,743 | 272,181 | (143,417) | | | | | |
| | Total | 100.0 | *$140,549 | $278,342 | $19,225 | $7,167 | $304,734 | $(164,185) | $2,541 | $306 | $2,829 | $ 594 | $(164,779) |

'78 data taken from Form R-1, Schedule 210.

Best Copy Available

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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79 Civ. 3118 (JM)

UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, Ohio 44107

*Plaintiff,*

—against—

LONG ISLAND RAIL ROAD COMPANY
Jamaica Station
Jamaica, New York 11435,

and

METROPOLITAN TRANSPORTATION AUTHORITY
OF NEW YORK
347 Madison Avenue
New York, New York 10017

*Defendants.*

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**AFFIDAVIT OF JAMES B. HUFF**

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

JAMES B. HUFF, being duly sworn, deposes and says:

1. I am the Comptroller of defendant Metropolitan Transportation Authority ("MTA") and make this affidavit in support of defendants' motion to dismiss the complaint or, in the alternative, to stay these proceed-

ings, and in opposition to plaintiff's motion for summary judgment and for a stay.

2. In addition to my responsibilities as Comptroller of MTA, I exercise general financial review of the operations of all the affiliated agencies of MTA, including defendant The Long Island Rail Road Company ("LIRR").

3. MTA has day-to-day operating responsibility for major commuter transportation systems in the New York metropolitan region, including rail transportation between Long Island and New York City, New York City's vast subway and bus systems, New York City's commuter rail operation on Staten Island, Nassau County's bus operations, and the great intrastate bridges and tunnels.

4. The purpose behind this coordination of operations dates back to 1968, and was the desire of the State Legislature to weld the several separate private and public agencies furnishing transit service in the metropolitan area into a single agency, in order to eliminate duplication and waste and to achieve a greater coordination of effort. *See* New York Laws 1967, c. 717, § 60. Through these several interlocking affiliates, MTA today moves almost six million bus and rail passengers each business day.

5. In addition to these commuter systems, MTA controls the operations of Conrail's Harlem and Hudson commuter lines and, in cooperation with the state of Connecticut, controls the operations of Conrail's New Haven line. And New York and New Jersey operate the commuter service PATH (Port Authority Trans-Hudson).

6. The LIRR is essentially a commuter passenger railroad. It is a public benefit corporation and a wholly-owned subsidiary of the MTA. The LIRR board consists of fourteen gubernatorial appointees who are the same

individuals who hold office as MTA board members. N.Y. Pub. Auth. Law §§ 1263(1), 1266(5). Moreover, the Chairman and Chief Executive Officer of the MTA serves as Chairman and Chief Executive Officer of the LIRR, and the MTA's chief operating officer, its Executive Director, serves as LIRR's chief operating officer. N.Y. Pub. Auth. Law § 1263(4).

7. The LIRR operates a commuter rail system serving approximately 260,000 passengers each day in Nassau, Suffolk, Queens, Kings, and New York Counties, and is the principal carrier used by residents of Nassau and Suffolk counties for daily commuting in and out of New York City. It does not operate anywhere outside those five counties.

8. The LIRR does provide some relatively limited freight services tied in with outside freight lines, but those services are a very small part of the LIRR's total operations. For example, in 1979 the LIRR provided the people of Long Island and New York City with 275,324 passenger train trips. By contrast, the LIRR operated only 4,472 freight train trips with approximately 41,000 freight cars, almost all of them short and most of them off-peak.

9. Another example is that the LIRR's gross freight revenues in 1979 were approximately $20 million, a figure which should realistically be reduced to $12.1 million when the LIRR's "freight surcharge" revenues, primarily intended to reimburse the LIRR for certain added Railroad Retirement Tax expenses imposed on its *passenger* personnel, are deducted. By contrast, the LIRR's total revenues, for passenges, freight, plus subsidies and surcharges, were over an estimated $300 million, or over 23 times greater than the LIRR's freight revenues.

10. The insignificance of the LIRR's freight operations is highlighted by simply comparing the number of

personnel in each function: the LIRR in 1979, with a total work force of 6,800 people, employed *4,837 operating personnel* to service its vast passenger operations. By contrast, the LIRR employed only *307 operating personnel* to service its entire freight operation.

11. The character of the LIRR has changed dramatically over the years. In 1926, when the federal Railway Labor Act was enacted, the LIRR was a part of the giant interstate Pennsylvania Railroad. The LIRR remained a part of the Pennsylvania until 1966, when the MTA (then known as the Metropolitan Commuter Transportation Authority) acquired the LIRR.

12. The LIRR was a freight and passenger rail carrier; today it is essentially a commuter passenger transit system. Over the past twenty years, the volume of freight carried by the LIRR has plummeted. In 1960, the LIRR handled 122,944 freight cars, or an average of 2364 freight cars each week. By 1970, that figure had dropped to 1409 freight cars each week. By 1979, the LIRR handled only an estimated 788 freight cars each week, and that freight volume continues to drop.

13. But, unlike the freight service, the total number of LIRR passengers has increased over the same period of time. In 1960, the LIRR carried about 64.4 million passengers; in 1970, about 70 million passengers; and in 1979, an estimated 77.3 million passengers.

14. In other words, over the past twenty years while the number of LIRR passengers has actually increased, the LIRR's freight operations have so drastically diminished that today the freight operations are merely a subsidiary, relatively insignificant portion of the LIRR's total system operations. The fact remains: the LIRR is essentially an intrastate commuter passenger system, with relatively insignificant ties to interstate freight traffic.

15. The LIRR is far different than other Class I railroads in the United States precisely because the LIRR, unlike other Class I railroads, carries an insignificant amount of interstate freight. Most Class I railroads are primarily freight carriers.

16. For example, according to the Association of American Railroads ("AAR"), in 1979 an estimated 96.9% of the total passenger and freight revenues for all Class I railroads consisted of freight revenues. By contrast, according to the AAR, in 1979 only 8.7% of the LIRR's passenger and freight revenues consisted of freight revenues. When public subsidies are taken into account, the percentage of revenues to gross revenues and subsidies is reduced to an insignificant 4.3%. This difference—96.9% versus 4.3%—starkly demonstrates that the LIRR is far different than the other railroads designated Class I by the Interstate Commerce Commission.

17. The State of New York recognizes its overwhelming local interest in the LIRR's passenger operations. In 1979, New York plunged approximately $129 million of its own and local funds into the LIRR passenger operations, and used approximately $9 million of scarce federal UMTA entitlements to supplement its own contribution.

18. The metropolitan transportation system, and the LIRR, in particular, could not have survived without state and local government assistance. The LIRR barely survived the post-World War II years, and only as a result of tax relief and indirect subsidies. The State has granted the LIRR tax exemptions since 1950, and has owned the LIRR outright for fourteen years. Over many years, the State and New York City have invested billions of dollars in capital plant in the New York metropolitan transit system. And in 1979 alone, the contribu-

tions of the State and its municipalities to the operating deficits of the great transit network serving the New York City metropolitan area was over $550 million.

19. With a work force of just 6,800 people, the LIRR has a grand total of seventeen "brotherhoods", each of which ordinarily insists upon dealing separately with management. Even when they negotiate as a group, the alliance is only temporary. One of these labor organizations has just five members, another has only twelve. This makes it almost impossible to maintain labor peace, and, as a consequence, both the workers and the public suffer.

20. For example, in the present situation, ten of the labor organizations have settled with the LIRR, but seven others, all of them originally members of the LIRR-wide negotiating panel, have escalated their demands, making imminent a paralyzing strike.

21. As a result of this fractionalization, labor negotiations on the LIRR are a year-round proposition which pre-occupy its operating executives, impairing their ability to perform well where it counts most—in the safe and reliable operation of passenger trains.

22. The dismal record of labor/management amity on the LIRR, since its acquisition by MTA in 1966, has seen two open strikes (one lasting 51 days), job actions too numerous to mention, and five negotiations which resulted in intervention by the President of the United States through Presidential fact finding boards.

23. In sharp contrast, MTA's two sister agencies charged with the responsibility for operating New York City's subway and bus systems have an aggregate of over 34,000 blue-collar employees who are represented for the most part (over 85%) by a single industrial union. The record of this union under municipal ownership dates back to 1940. During this entire period, there has been

just one strike, despite an industry pattern of relatively short collective bargaining contracts—two years maximum.

24. The wages paid to LIRR employees are referred to by the managements of privately-owned railroads, with bitterness, as "champagne" wages. *See* ICC Docket No. 35153, *The Long Island Railroad Company* v. *Ahnapee & Western Railway Co., et al.*, decision of Hearing Examiner Walter D. Matson, served December 24, 1971.

25. A strike is now eminent. Negotiations on a new contract between the LIRR and its seven operating unions, including plaintiff, reached an impasse, and the LIRR's employees struck on December 8, 1979. They returned to work only after a Presidential order on December 14, 1979 ordered them to return to work for a period of 60 days. That 60-day period expired at 12:01 a.m. on Thursday, February 14, 1980. Attempts to resolve the remaining disputes between the LIRR and its unions, including plaintiff, have been unsuccessful.

WHEREFORE, I respectfully request that the Court grant defendants' motion to dismiss the complaint, or, in the alternative, to stay these proceedings, and deny plaintiff's motion for summary judgment and for a stay.

/s/ James B. Huff
JAMES B. HUFF

Sworn to before me March 3, 1980

/s/ Todd M. Brinberg
TODD M. BRINBERG
Notary Public

Commission Expires March 30, 1981

## EXCERPT OF THE FINANCIAL AND OPERATING STATISTICS, CLASS I RAILROADS

FINANCIAL AND
OPERATING STATISTICS

CLASS I RAILROADS

for the twelve months ended
Dec. 31, 1978 [SEAL]

statement no. 100

INTERSTATE COMMERCE COMMISSION
BUREAU OF ACCOUNTS

• • • •

6

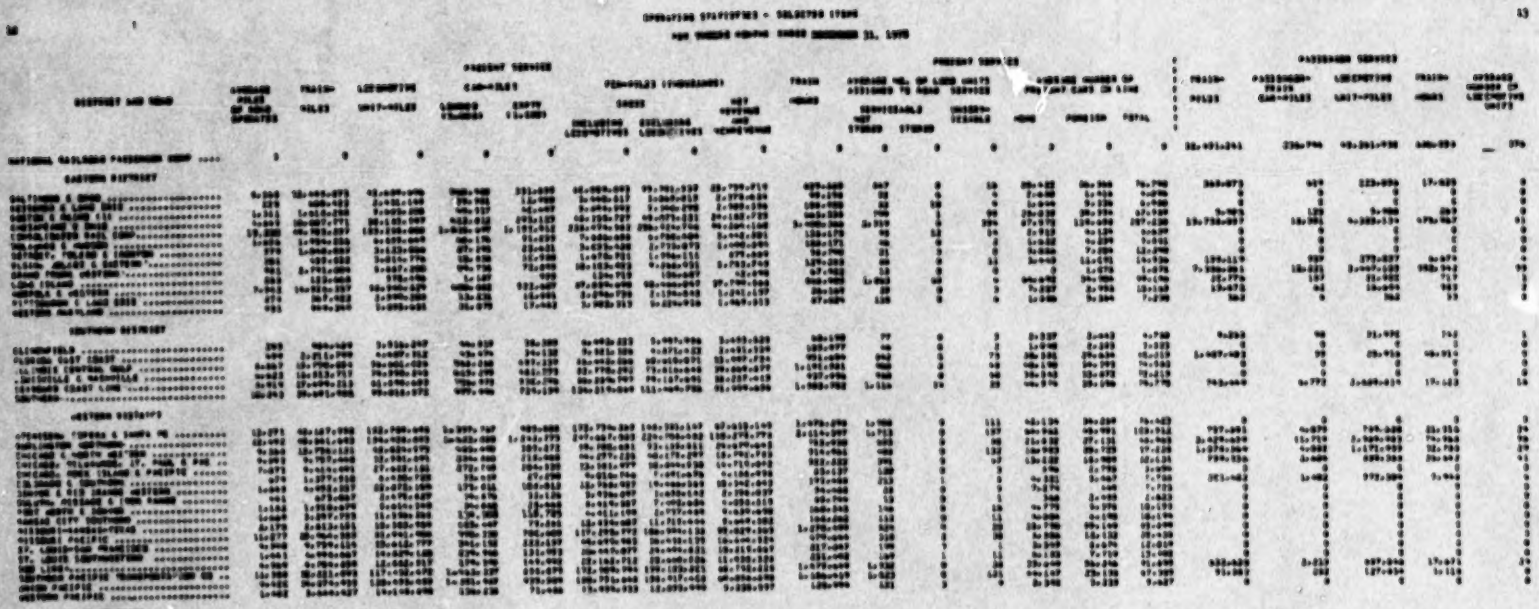
INCOME STATEMENT, DIVIDENDS AND FINANCIAL RATIOS - BY CARRIERS
FOR THE CALENDAR YEARS ENDED DECEMBER 31, 1971

7

| DISTRICT, ROAD AND YEAR | OPERATING REVENUES: FREIGHT | FREIGHT CHANGE | TOTAL (1) | TOTAL CHANGE | OPERATING EXPENSES: MAINTENANCE | DEPRECIATION (INCLUDED IN MAINTENANCE) | TRANSPORTATION | TOTAL | RATIO TO OPERATING REVENUES: MAINT. | TRANS. | TOTAL OPER. EXP. | INCOME TAXES ON ORDINARY INCOME (2) | NET INCOME | DIVIDENDS DECLARED |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| TOTAL - UNITED STATES ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 14.3 | 45.9 | 99.2 | [illegible] | [illegible] | [illegible] |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 98.0 | 146.6 | 246.8 | 0 | [illegible] | 0 |
| EASTERN DISTRICT | | | | | | | | | | | | | | |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 42.0 | 42.8 | 91.7 | [illegible] | [illegible] | [illegible] |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 31.3 | 36.0 | 66.4 | [illegible] | [illegible] | [illegible] |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 44.0 | 45.0 | 101.9 | [illegible] | [illegible] | 0 |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 41.9 | 47.6 | 98.2 | [illegible] | [illegible] | [illegible] |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 36.1 | 34.0 | 120.3 | [illegible] | [illegible] | 0 |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 98.9 | 98.4 | 111.3 | 0 | [illegible] | 0 |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 44.3 | 46.6 | 99.2 | 0 | [illegible] | 0 |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 33.3 | 34.4 | 73.8 | [illegible] | [illegible] | [illegible] |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 34.2 | 47.7 | 97.2 | 0 | [illegible] | 0 |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 31.2 | 34.1 | 114.2 | 0 | [illegible] | 0 |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 37.0 | 46.4 | 86.3 | [illegible] | [illegible] | [illegible] |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 33.4 | 34.2 | 76.7 | [illegible] | [illegible] | [illegible] |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 31.6 | 41.3 | 85.3 | [illegible] | [illegible] | [illegible] |
| SOUTHERN DISTRICT | | | | | | | | | | | | | | |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 44.2 | 35.4 | 54.4 | [illegible] | 0 | 0 |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 36.2 | 31.9 | 70.6 | [illegible] | [illegible] | 0 |
| [illegible] ..... 1971 | 0 | .0 | 0 | .0 | 0 | 0 | 0 | 0 | .0 | .0 | .0 | 0 | 0 | 0 |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 49.2 | 45.2 | 99.6 | [illegible] | [illegible] | [illegible] |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 43.9 | 44.1 | 97.4 | [illegible] | [illegible] | 0 |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 36.9 | 42.2 | 94.3 | [illegible] | [illegible] | [illegible] |
| [illegible] ..... 1971 | [illegible] | .0 | [illegible] | .0 | [illegible] | [illegible] | [illegible] | [illegible] | 34.9 | 35.9 | 82.8 | [illegible] | [illegible] | [illegible] |

(1) PASSENGER REVENUE DETAIL ON PAGE 8
(2) EFFECT OF TAXPAYER
SOURCE: ROAD DATA: ANNUALLY REPORT OF
REVENUES, EXPENSES AND RETAINED-
EARNINGS

(3) Includes accruals for federal, state and other income taxes applicable to ordinary income. In prior publications only federal tax accruals were shown.



No. 80-1925

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION,

*Petitioner,*

—v.—

LONG ISLAND RAILROAD COMPANY

and

METROPOLITAN TRANSPORTATION AUTHORITY,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

May 30, 1981

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## Counter-Statement of the Question Presented

Should this Court grant certiorari to review the decision of the Court of Appeals that labor relations on the state-owned and operated Long Island Rail Road are governed by state law rather than the federal Railway Labor Act, on the basis of undisputed facts in the record showing that the railroad is an intrastate commuter railroad with only an insignificant terminal freight operation and by direct application to those facts of this Court's analysis in *National League of Cities v. Usery*?

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## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

### Statutory Provisions Involved

Those statutory provisions involved which are not a part of the appendix to the Petition are set forth in the Appendix, *infra*.

### Counter-Statement of the Case

**Proceedings Below**

Petitioner United Transportation Union (the "union") is one of seventeen unions representing the public employees of The Long Island Rail Road Company (the "LIRR"), a railroad owned and operated by the State of New York. The union commenced this action against the LIRR and its corporate

parent, Metropolitan Transportation Authority ("MTA"), a state agency, on December 7, 1979, the eve of the union's December 8 strike against the LIRR. The union sought a declaration that the Railway Labor Act* ("RLA") rather than state law governed labor relations on the railroad, thus permitting the union's members to evade state law sanctions if they struck the railroad after collective bargaining had run its course. The District Court held that the RLA governs the LIRR's labor relations and preempts state law, and granted the union's motion for summary judgment. The Court of Appeals for the Second Circuit unanimously reversed the District Court decision. Relying on this Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), as it applied to the facts of this case, the Second Circuit held that the RLA unconstitutionally impairs New York State's ability to structure employer-employee relationships in one of its agencies, the LIRR, in the state's role as the sole provider of an essential public service. [3a**] The union's application for rehearing with suggestion for rehearing *en banc* was denied by the Court of Appeals.

**Background of Dispute**

On January 20, 1966 the State of New York, acting through its chosen governmental instrumentality, Metropolitan Commuter Transportation Authority (since renamed Metropolitan Transportation Authority), purchased from the Pennsylvania Railroad all of the capital stock of the latter's wholly-owned subsidiary corporation, The Long Island Rail Road Company, and rescued that ill-starred line from inevitable bankruptcy [J.A. 288***]. MTA was then, and is today, a state agency. The form of the railroad's operating entity, a stock corporation, was continued under state legislation giving MTA the option to hold and operate its properties through stock subsidiaries—in

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* 45 U.S.C. §§ 151 *et seq.*

** Citations in the form "___ a" refer to the pages in the appendix to the Petition.

*** Citations in the form "J.A. ___" refer to pages in the joint appendix in the Court of Appeals.

which event the employees of the subsidiary were not treated as public employees under state law—or through public benefit corporation subsidiaries, in which event the officers and employees of the operating entity automatically became public employees. 1966 N.Y. Laws, Chapter 415, §§ 2 and 5. On February 8, 1980, fourteen years after the acquisition, MTA converted its LIRR subsidiary from a stock corporation to a public benefit corporation and LIRR officers and employees thereby became public employees. The principal objective of this action was to subject the railroad's 6,800 employees to the state's so-called Taylor Law, N.Y. Civ. Serv. Law §§ 200-214 (9 McKinney's Consolidated Laws of New York), a law drafted along the lines of the National Labor Relations Act, which comprehensively regulates labor relations between the 900,000 unionized governmental employees in the State of New York and their 3,300 state and municipal employers and, *inter alia*, prohibits strikes by those employees.

MTA had valid reasons both for permitting the concept of a private employment relationship to continue for so long and for converting the relationship to a public one. Those reasons, set forth in the District Court record in this case and repeated below, relate to the unique characteristics and history of the LIRR. They belie the union's claim that the decision of the Court of Appeals sustaining MTA's efforts has widespread ramifications.

* * * * *

The LIRR is a unique railroad with a unique history. Unlike any other federally-regulated rail carrier, it has always been predominantly an intrastate passenger railroad. Its participation in the handling of interstate freight movements which have reached Long Island—the only possible basis for RLA jurisdiction*—has always been a relatively minor portion of its

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* RLA coverage of railroads depends upon coverage of the employer under the Interstate Commerce Act. Interstate Commerce Act coverage, in turn, exists only if the employer is actually engaged in interstate activity, freight or passenger. An employer such as the LIRR whose activities are limited to a single state is not covered by either act, unless, as in the case of

activities. Even in 1926, when the RLA was enacted and when railroading was still a prosperous business, LIRR freight revenues accounted for just 31.7% of gross revenues [J.A. 277-278].

By February, 1980, when MTA converted the railroad to public benefit corporation status, the LIRR passenger operation, conducted entirely within the state, had increased from 73.65 million passengers in 1966, when the state acquired the railroad, to 77.37 million [J.A. 275]. That ridership was preponderantly of the journey-to-work variety, no different in kind than New York City's subway ridership [J.A. 269]. But while the intrastate passenger ridership had held up, freight operations had plummeted. Only 40,936* freight cars were handled in 1979, compared with almost 114,000 in 1966 [J.A. 275]. While freight revenue had constituted 11.8% of gross LIRR revenue in 1966, it was down to but 4% in 1979 [J.A. 277]. In 1979 the LIRR operated 275,324 passenger trains and just 4,472** freight trains [J.A. 287]. And most telling of all these statistics, in 1979 the number of LIRR operating personnel engaged in handling freight had dwindled to a mere 307 bodies, less than 5% of the railroad's work force [J.A. 287].

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the LIRR freight service, it participates with other carriers in effecting rail movements which, combined, produce a journey crossing state lines. 45 U.S.C. § 151, cl. First; 49 U.S.C. § 10501(a) and (b); *United States v. Union Stock Yard*, 226 U.S. 286 (1912).

* As a gauge of the insignificance of this number, Conrail reported handling 4.876 million cars that year in its Form QCS filed with the Interstate Commerce Commission.

** This number actually overemphasizes the size of the freight operation. In 1979 these freight trains averaged less than 10 cars each. This is typical of a "terminating" railroad such as the LIRR. The LIRR does not act as a "bridge" carrier carrying through traffic which originates and terminates off-line, nor does it have any significant local traffic. Virtually all of its freight traffic is "interline" (exchanged with other railroads) and 90% of that traffic consists of goods destined for delivery on Long Island.

RLA coverage had not been conducive to labor peace on the railroad during the fourteen years of state ownership. The craft union mandate of the RLA regarding the composition of bargaining units, 45 U.S.C. §§ 151, cl. Fifth and 152, cl. Fourth, which made sense in an industry which historically had bargained with its unions on a nationwide basis, continued to sustain a total of no less than seventeen unions on the LIRR property, one with as few as five members and another with just twelve [J.A. 290]. But while these seventeen unions took advantage of a national law to protect their separate identities, they studiously disassociated themselves from the periodic national labor settlements negotiated by their parent "international" unions and refused to be bound by them. Instead, each of them insisted on bargaining "locally" and, worse still, separately with management [J.A. 290]. Labor negotiations on the LIRR had become a year-round proposition which preoccupied the railroad's management personnel and impaired their ability to operate the railroad safely and reliably [J.A. 290]. RLA ineffectiveness can be gauged by the fact that between 1966 and 1979 there were two open strikes (one lasting over 50 days), numerous job actions and no less than five property-wide negotiations which required intervention by the President of the United States and the establishment of Presidential fact-finding boards before settlement could be reached [J.A. 290].

During almost the whole of this period of labor unrest the state Taylor Law, which governs every other public employee, state and local, in the State of New York, had been in effect. Transition to its governance presented no great problems because its mechanics so greatly resembled RLA procedures, the principal substantive difference being the Taylor Law's denial of the right to strike and the absence of a statutory direction that bargaining units be structured along craft lines. Moreover, in 1968 the state Legislature had broadened MTA's mass transportation responsibility from 260,000 daily LIRR passengers to include New York City's 5.5 million daily subway

and bus riders, transforming this relatively small commuter railroad into a constituent part of the largest transit operation in the nation. 1967 N.Y. Laws, Chapter 717, § 60. The LIRR work force of 6,800 people had become just a small part of an MTA workforce of some 50,000 public employees, and the LIRR contingent was the only one not covered by the Taylor Law.

Finally, the state's financial stake in this commuter railroad had greatly increased between 1966 and 1980. Hundreds of millions of dollars of taxpayer subsidies had been invested in improvements to its capital plant. In 1979 alone the state had provided over $129 million of taxpayer funds to meet just the ordinary operating expenses of the railroad [J.A. 289]. Operating subsidies in that year accounted for 50% of LIRR gross income [J.A. 277-278].

By 1980 the LIRR bore no resemblance whatever to any railroad in the United States subject to RLA regulation, the fact of public ownership put aside. Those few railroads throughout the nation which were still conducting local passenger operations in addition to their freight operations, as a group, showed a ratio of interstate freight revenue to aggregate revenue of 96.9% [J.A. 273]. The LIRR showed 4% [J.A. 289]. The activities of just 307 LIRR employees were responsible for subjecting the railroad's entire work-force of 6,800 state employees to federal labor regulation, including a rule of law enacted in 1926, when the LIRR was in private hands as part of a vast interstate rail system, which countenanced strikes in direct opposition to the considered public policy of the State of New York.* It was in this factual setting that MTA acted to make LIRR employees public employees.

These unique circumstances clearly demonstrate that the legal issues resolved by the decision of the Court of Appeals

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* The public policy of the federal government is identical. Federal employees may not strike. 5 U.S.C. § 7311.

will not have a direct bearing on railroads other than the LIRR or on employees or labor organizations other than those of the LIRR.

## Reasons Why the Petition Should be Denied

The decision of the Court of Appeals, based on undisputed facts in the record, fully conforms to this Court's holding in *National League of Cities v. Usery.* It does not conflict in any way with prior decisions of this Court. In addition, the Court of Appeals decision does not conflict with any decision of any other circuit Court of Appeals. Finally, the Court of Appeals decision does not raise an important federal question which must be decided by this Court. It was concerned with a unique, local situation. Its effect on the general scheme of federal regulation in the area of interstate railroads is *de minimis.*

## POINT I

### The Application of the RLA to the LIRR Violates the Tenth Amendment by Displacing Essential Governmental Decisions of the State of New York.

The opinion of the Court of Appeals rightly relied upon the decision of this Court in *National League of Cities v. Usery, supra,* and its holding that "Congress may not exercise [the Commerce Power] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855. Surely, when the federal government instructs a state that it must permit its employees to strike to enforce their wage demands, there has been as much an abrogation of the state's otherwise plenary authority to structure its relationship with its employees as there was when *National League of Cities* considered the effort by Congress to impose minimum wage, maximum hour and overtime pay constraints upon the States.

Surely, if "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ . . . [and] what hours those persons will work," 426 U.S. at 845, another attribute is the power to determine *whether* they must work as a condition to retaining public employment. It cannot be doubted that the State of New York has always regarded its prohibition of strikes as an essential part of every public employment contract. Strikes were prohibited both under common law and under the Condon-Wadlin Law, the statutory predecessor to the Taylor Law. *City of New York v. De Lury*, 23 N.Y.2d 175, 295 N.Y.S.2d 901, 243 N.E.2d 128 (1968), *appeal dismissed*, 394 U.S. 455, *rehearing denied*, 396 U.S. 872 (1969); *Di Maggio v. Brown*, 19 N.Y.2d 283, 279 N.Y.S.2d 161, 225 N.E.2d 871 (1967).

## POINT II

### The Furnishing of Transit Service Is a Protected Function of State and Local Government Within the Rationale of *National League of Cities*.

The Court of Appeals properly included transit within the *National League of Cities* doctrine. This Court made it clear in that case that the "furnishing of public services" such as "fire prevention, police protection, sanitation, public health, and parks and recreation," 426 U.S. at 851, was not intended to be an "exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." 426 U.S. at 852 n.16. Surely a transit system such as MTA's, which transports three million people to and from their jobs each working day with no practical alternative at hand for them if the system breaks down,* is providing an integral public service within the intendment of *National League of Cities*. The union's claim

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* It is estimated that there are some 1.81 million jobs between Central Park and the Battery. Tri-State Regional Planning Commission, *Metromoni-*

that the LIRR carries some small portion of its ridership to the "far reaches" of Long Island cannot obscure the fact that the LIRR is an important part of that transit system, serving a substantial daily ridership of 260,000 which is overwhelmingly commuter in nature [J.A. 286, 296]. Transit is not provided by government everywhere, but where it is provided, in the great cities of the nation and in the New York City metropolitan area in particular, it is literally essential* for the survival of millions.

The union emphasizes the use of the word "traditional" in the test of *National League of Cities*. It could of course be pointed out that municipal ownership and operation of transit facilities in the State of New York is not a new phenomenon, dating back to 1904, with the opening of the first municipally-built subway line, and to 1940, the year in which all private subway operators were supplanted by municipal employees; but it can be argued that the concept of tradition implies the need for a nationwide test, consistent with the line of cases in this Court dealing with intergovernmental immunity from taxation in our federal system.**

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*tor—A Regional Review of Social and Economic Trends* (July 1980). Two transit strikes during the past fifteen years have demonstrated that the automobile is not an alternative when so large a work force is compressed within so limited a geographical area.

* The terms "essential" and "integral" are, as used here, synonymous. Contrary to the union's contention, *National League of Cities* did not couple the "integral" test of a given public function with the additional requirement that the *function* be one the performance of which is essential to the separate and independent existence of the fifty States. The decision in that case made it clear that the activities which were deemed essential to the separate and independent existence of the States were the making of those determinations which control the employer-employee relationship and thus determine the cost of providing the function, such as the fixing of salaries, the establishment of a maximum number of work hours and the like. *National League of Cities*, 426 U.S. at 845, 851.

** "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power." *United States v. California*, 297 U.S. 175, 185 (1936). The view that

These taxation precedents give insight into the sense in which the term "traditional" was used in *National League of Cities*. Each of them involved a situation in which a state had embarked upon an activity in direct competition with private industry. In the leading case, *New York v. United States*, 326 U.S. 572 (1946), the state claimed that its sales of mineral waters constituted a "usual, traditional and essential governmental function," *id.* at 574, and was met by the response that it was ". . . in competition with private waters, the sale of which Congress has found necessary to tap as a source of revenue." *Id.* at 581. None of the cases holding state activities taxable involved circumstances in which competition had ended, a situation in which a state was forced to step in, not as a volunteer replacing a private citizen who would otherwise be paying federal taxes,* but rather to fill a void created by the mass withdrawal of private entrepreneurs. This, literally, is our case.**

Transit has changed. It is no longer provided by private entrepreneurs, as it was almost a half century ago when *Helvering v. Powers*, 293 U.S. 214 (1934), was decided. The Court of Appeals properly took judicial notice of the fact that the industry, today, may properly be characterized as one to which state and local governments have succeeded by default.

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there is no intergovernmental immunity when the Commerce Clause is invoked by Congress was rejected by *National League of Cities* when it overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968). This Court appreciated that the power to regulate as much as the power to tax, unchecked, could "devour the essentials of state sovereignty". *National League of Cities*, 426 U.S. at 855, quoting Justice Douglas' dissent in *Wirtz*.

* *See* Justice Stone's opinion in *New York v. United States*, 326 U.S. at 590: "[T]he effect of the immunity on the national taxing power is to be determined not quantitively but by its operation and tendency in withdrawing taxable property or activities from the reach of federal taxation."

** It was also the case in *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), which was concerned with a similar phenomenon in the airport industry.

Transit is no longer a business; it is, today, almost exclusively a governmental service.*

In the Court of Appeals, the union cited statistics indicating that in the omnibus segment of the transit industry there are still 320 privately-owned companies in operation nationally, but the union failed to show how small a ridership those companies carry. Nor did it show how many of them are mere operating entities for municipalities and how many more are completely dependent on governmental subsidies for survival. The transit industry's trade association, the American Public Transit Association, reports a single dispositive fact: the publicly *owned* portion of the nation's transit network, *alone*, carries over 91% of the nation's transit ridership (5.456 billion trips annually). *Transit Fact Book* (1978-1979 Edition) at 39. The industry survives only as the result of massive governmental subsidies, subsidies which provide almost 50% of gross income. *Id.* at 19.**

Additional statistics can be marshaled to show that all fourteen of the nation's freight railroads which are still involved in transit,*** providing local passenger or "commuter"

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* It is principally for this reason that the "railroad" cases, *United States v. California*, 297 U.S. 175 (1936), *California v. Taylor*, 353 U.S. 553 (1957), and *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), are not relevant. Although marked by numerous reorganizations, freight railroading in the United States—as opposed to local passenger railroading (see *infra*)—is still a private sector function. All three of those cases were concerned with freight railroading.

** The transit industry does not include intercity buses, a service still provided by the private sector, or intercity passenger railroading, a service provided exclusively by the federally-sponsored AMTRAK corporation. *Transit Fact Book* (1978-1979 Edition) at 48.

*** The union denies reality when it asserts that commuter railroad services are not a part of the transit industry and that commuter railroads do not provide "urban mass transportation" service. The very authority which the union cites for support in other contexts, the American Public Transit Association, recognizes that commuter railroading is an integral part of the transit industry. *Transit Fact Book* (1978-79 Edition) at 3, 7 and 48. And if such railroads do not provide "urban mass transportation" service, then how

services, are privately owned. Again, however, analysis shows how bankrupt their passenger services truly are. All fourteen operate under local subsidy contracts. *Transit Fact Book* (1978-1979 Edition) at 74 and 75. In the latest year in which statistics have been assembled, those passenger services had operating revenues of $370 million and operating expenses of $778 million. *Id.* at 74. As an indication of the ailing health of these passenger services, Conrail, the largest of the group, has a standing authorization from Congress to discontinue any part of its passenger operations which is not fully subsidized by local government. 45 U.S.C. § 744(e). The "commuter railroad" portion of the transit industry is publicly subsidized rather than publicly owned, as are buses and subways; obviously, there must be a single operating responsibility whenever freight trains and passenger trains must run over the same tracks. Fee ownership notwithstanding, the nation's commuter railroads, today, are being run for the account of the States. The union cannot deny this.

Transit, today, is no longer a business; it is a public service—a public service provided only by or for the account of the States.* When they provide that service they are necessarily

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can it be that the LIRR and virtually every commuter railroad in the nation have been routinely receiving federal capital and operating assistance under an "Urban Mass Transportation Act" which Congress enacted seventeen years ago? "Commuter" railroads were given that appellation because their principal function is to carry their passengers to and from their places of work each day. By definition, such a service is essentially local in nature. It is invariably underwritten by local and state governments. Typical examples are state agencies in New York (MTA), Illinois (Regional Transportation Authority of Northeastern Illinois), and Pennsylvania (Southeast Pennsylvania Transportation Authority), each of which provides the full spectrum of transit service, bus, subway and commuter railroad.

* Congress wants no part of transit save in its role as an indirect subsidizer under the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601 *et seq.* That act permits the making of federal grants of financial assistance only to states and municipalities. Each grant must be matched by a specified minimum percentage of local tax dollars and then applied by the state or the municipality, as the direct underwriter of the transit service, to the purchase of capital assets or the payment of operating deficits. This

acting "as States." *National League of Cities*, 426 U.S. at 845. Certainly they are no longer acting as "traders" among a larger group of private entrepreneurs* (*see* Justice Frankfurter's opinion in *New York v. United States*, *supra*, and Justice Douglas' dissent in *Maryland v. Wirtz*, *supra*), and certainly they have no hope of making a "profit" in competition with the private sector. *See* Chief Justice Burger's opinion in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

Perhaps this phenomenon is not sufficiently aged in order for transit to deserve the adjective "traditional."** Perhaps, too, that is why *National League of Cities* used the terms "traditional" and "integral" interchangeably. Certainly it is the undeniable fact that if Congress were to tax transit today, it would be taxing the States and only the States; that if it were to regulate transit today, it would be regulating the States and only the States. If Congress, today, were to seek to regulate directly the activities of employers in the transit industry, it would indeed be an "exercise of congressional authority directed, not to private citizens, but to the States as States." *National League of Cities*, 426 U.S. at 845.

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program will likely diminish in the near term. The current Administration intends to eliminate all operating assistance within the next four years. *N.Y. Times*, Apr. 9, 1981, § B at 13.

* See Justice Powell's preliminary assumption in *Reeves, Inc. v. Stake*, ___ U.S. ___, 100 S.Ct. 2271, 2285 (1980), on the reach of *National League of Cities*: "The threshold question is whether South Dakota had undertaken integral government operations in an area of traditional governmental functions, *or whether it has participated in the marketplace as a private firm.*" (Emphasis added.)

** The transition to public ownership is hardly a new development, however. Publicly owned transit systems were carrying over 50% of the nation's transit ridership as early as 1967. *Transit Fact Book* (1978-79 Edition) at 55.

## POINT III

### The Small Fraction of LIRR Interstate Freight Activity Should Not Tip the Scales in Favor of Federal Regulation.

A small portion of the LIRR's business is involved in the interstate movement of freight cars, even though all of its tracks lie entirely within New York's boundaries. It has been shown, *supra*, how small that involvement is. The Court of Appeals stated that LIRR passenger revenues provided over 80% of total revenue [24a], but this was indeed an understatement. Earlier in its opinion that court correctly recited that freight revenues, at $12.1 million in 1979, compared with total income (gross revenues combined with public subsidies) of $300 million in that year [4a]. It is the fact that the federal interest in this case, based on 1979 data, is marked by $12.1 million in revenue, or 4% of total LIRR income, and 307 employees, less than 5% of the LIRR work force. The state's interest is the remaining $287.9 million of income (96% of the whole), all 6,800 of the railroad's employees and all 260,000 of its daily riders. The Court of Appeals weighed* these factors one against the other, which Justice Blackmun viewed the plurality as having done in *National League of Cities*, and found in favor of the Tenth Amendment. No other answer is permissible.

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* It should be remembered that the weighing of these factors was not done in the context of a federal law which sought to exercise the Commerce Clause to the fullest permissible extent. In our case, unlike *National League of Cities*, Congress has expressly limited the scope of RLA regulation to businesses actively engaged in interstate commerce and it has expressly exempted those whose activities are conducted entirely within the boundaries of a single state. 45 U.S.C. § 151, cl. First; 49 U.S.C. § 10501(a) and (b). To read such a statute as sweeping into its ambit the whole of an intrastate business simply because 4% of its revenues derives from the interstate aspect of its operations is indeed a strain on the Supremacy Clause.

## Conclusion

For the foregoing reasons, the petition should be denied.

May 30, 1981

Respectfully submitted,

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# APPENDIX

**1966 Laws of New York, Chapter 415**
**Sections 2 and 5**

**(New material shown bold;**
**deleted material shown italic.)**

§ 2. Subdivision nine of section twelve hundred sixty-five of such law, as amended by chapter six hundred thirty-four of the laws of nineteen hundred sixty-five, is hereby amended to read as follows:

9. (a) Notwithstanding section one hundred thirteen of the retirement and social security law or any other general or special law, the authority and any of its subsidiary corporations may continue or provide to its affected officers and employees any retirement, disability, death or other benefits provided or required for railroad personnel pursuant to federal or state law. Notwithstanding any provisions of the civil service law, no officer or employee of *any* **a subsidiary** corporation *acquired by* **of** the authority, **other than a public benefit subsidiary corporation,** shall be a public officer or a public employee;

(b) The authority and any of its **public benefit** subsidiary corporations may be a "participating employer" in the New York state employees' retirement system with respect to one or more classes of officers and employees of such authority or any such **public benefit** subsidiary corporation, as may be provided by resolution of such authority or any such **public benefit** subsidiary corporation, as the case may be, or any subsequent amendment thereof, filed with the comptroller and accepted by him pursuant to section thirty-one of the retirement and social security law. In taking any action pursuant to this paragraph (b), the authority and any of its **public benefit** subsidiary corporations shall consider the coverages and benefits continued or provided pursuant to paragraph (a) of this subdivision;

* * * * *

§ 5. Subdivision five of section twelve hundred sixty-six of such law, as added by chapter three hundred twenty-four of the laws of nineteen hundred sixty-five, is hereby amended to read as follows:

5. The authority may acquire, **hold**, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any of its facilities through, **and cause any one or more of its powers, duties, functions or activities to be exercised or performed by**, one or more wholly owned subsidiary corporations of the authority and may transfer to or from any such corporation any moneys, real property or other property for any of the purposes of this title. *If the authority determines from time to time to form such a subsidiary corporation, it shall do so by executing and filing with the secretary of state of New York a certificate of incorporation, which may be amended from time to time by similar filing, and which shall set forth the name of such subsidiary corporation, its duration, the location of its principal office, and any or all of the purposes of acquiring, owning, leasing, establishing, constructing, effectuating, operating, maintaining, renovating, improving, extending or repairing one or more facilities of the authority. Such subsidiary corporation shall be a body politic and corporate constituting a public benefit corporation.* The directors **or members** of **each** such subsidiary corporation shall be the same persons holding the offices of members of the authority. *Such subsidiary corporation shall have all the powers vested in the authority itself for the purposes of this title except that it shall not have the power to contract indebtedness. Such* **Each such** subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority and of the authority's property, functions and activities. *Such* **Each such** subsidiary corporation shall be subject to the restrictions and limitations to which the authority may be subject. *Such* **Each such** subsidiary corporation shall be subject to suit in accordance with section twelve hundred seventy-six of this title *as if such subsidiary corpora-*

*tion were the authority itself.* The employees of any such subsidiary corporation, except those who are also employees of the authority, shall not be deemed employees of the authority.

**If the authority shall determine that one or more of its subsidiary corporations should be in the form of a public benefit corporation, it shall create each such public benefit corporation by executing and filing with the secretary of state a certificate of incorporation, which may be amended from time to time by filing, which shall set forth the name of such public benefit subsidiary corporation, its duration, the location of its principal office, and any or all of the purposes of acquiring, owning, leasing, establishing, constructing, effectuating, operating, maintaining, renovating, improving, extending or repairing one or more facilities of the authority. Each such public benefit subsidiary corporation shall be a body politic and corporate and shall have all those powers vested in the authority by the provisions of this title which the authority shall determine to include in its certificate of incorporation except the power to contract indebtedness.**

Whenever any state, political subdivision, municipality, commission, agency, officer, department, board, division or person is authorized and empowered for any of the purposes of this title to co-operate and enter into agreements with the authority such state, political subdivision, municipality, commission, agency, officer, department, board, division of person shall have the same authorization and power for any of such purposes to co-operate and enter into agreements with *such* a subsidiary corporation **of the authority.**

## 1967 Laws of New York, Chapter 717, Section 60

§ 60. Legislative findings and declaration of purpose

It is hereby found and declared that:

The development and operation of public-owned mass transportation facilities serving the New York metropolitan region are currently the responsibility of several agencies;

Significant progress has been made on the task of coordinating planning for such facilities within such region through the establishment by the states of New Jersey, Connecticut and New York of the tri-state transportation commission;

It is the sense of the legislature, as a matter of state concern, that a greater degree of coordination of effort should now be sought with respect to the activities of four such agencies which are presently responsible for the development and operation of certain of the more important of these facilities, these agencies being the metropolitan commuter transportation authority, the New York city transit authority, the triborough bridge and tunnel authority and the Manhattan and Bronx surface transit operating authority;

To this end it is the purpose of this title to place each of these authorities under common control by a single board and to impose upon that board the additional responsibility of developing and implementing a unified mass transportation policy for such region.

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No. 80-1925

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*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## PETITIONER'S REPLY MEMORANDUM

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## PETITIONER'S REPLY MEMORANDUM

A. Two actions of this Court on June 15, 1981 reinforce our submission that the decision below, which rests on a novel application of *National League of Cities v. Usery*, 426 U.S. 833 (*National League*), merits plenary review by this Court.

1. In *Hodel v. Virginia Surface Mining and Reclamation Association* (Nos. 79-1538 and 79-1596), —— U.S. —— ("*Virginia Surface*") and a companion case, *Hodel v. Indiana* (No. 80-231), —— U.S. —— (*Indiana*) the Court sustained the Surface Mining and Reclamation Control Act of 1977 against challenges based on the rationale of *National League*. (*Virginia Surface*, slip op., pp. 17-25; *Indiana*, slip op., pp. 13-14). In so doing, the Court placed the following authoritative gloss on *National League*:

> It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each*

> of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.* at 852. When the Surface Mining Act is examined in light of these principles, it is clear that appellees' Tenth Amendment challenge must fail because the first of the three requirements is not satisfied. The District Court's holding to the contrary rests on an unwarranted extension of the decision in *National League of Cities.* [*Virginia Surface*, slip op., p. 21.]

The Court of Appeals' reading of *National League* is incompatible with each of these three test points. First, as pointed out in our petition (at p. 16), the Railway Labor Act does not purport to regulate "States as States," but rather is directed to the regulation of interstate railroads as railroads. Second, the decision below contravenes the requirement that the matters which Congress seeks to regulate in the challenged statute (in this case, the RLA) must be "indisputably 'attributes of state sovereignty' "; on the contrary, under the Court of Appeals' analysis the scope of state activities which would be exempt from federal regulation is one which constantly changes with circumstances (Pet. App. p. 16a), characterized by that court itself as a "fluid concept of sovereignty" (*id.*, p. 22a). Indeed, the Court of Appeals appears to have merged what are stated in *Virginia Surface* to be separate through interrelated requirements by treating "functions essential to separate and independent existence," "integral governmental functions," and "traditional governmental functions." (Pet. App. 13a) as a single concept, which in that court's opinion are "called 'integral governmental functions' " (*ibid.*; see Pet. pp. 12-14). Even if it were not clear from *Virginia Surface* that the court below has misapplied *National League*, the

scope of the second and third requirements raises a question of constitutional law of recurring importance with respect to which Congress and the States as well as the parties to the preesnt and similar potential controversies require the guidance that only this Court can authoritatively give.

2. On June 15, 1981, the Court noted probable jurisdiction in *Federal Energy Regulatory Commission v. Mississippi* (No. 80-1749) to review a lower court's holding that certain provisions of the Public Utilities Regulatory Policies Act of 1978 are unconstitutional under *National League*. We submit that it will aid the Court in elaborating its elucidation of *National League* to grant certiorari in this case and to set the oral argument in these two cases in tandem.

B. Respondents' sole effort to distinguish this case from *California v. Taylor*, 353 U.S. 553, and the other railroad cases relied on at pp. 9-12 of the Petition is that "those cases were concerned with freight railroading" (Brief in Opp., p. 11). None of those cases, nor the *National League* footnote which disavowed overruling them (426 U.S. at 852, n.13), relied on that circumstance (see Pet., p. 12). Respondents admit, though they minimize, the fact that LIRR is also engaged in "freight railroading" (*id.*, pp. 3-4, 12). But quite aside from the controversy between the parties concerning the relative importance of the LIRR's freight business, it is implicit in respondents' argument that the Tenth Amendment makes RLA wholly inapplicable to the LIRR although it is a freight carrier, because of the carrier's passenger service. Nothing in *National League* justifies what is, in effect, a *Shreveport*[1] doctrine in reverse, whereby a party subject to federal regulation is relieved therefrom by the Tenth Amendment because it is also engaged in activity which the Tenth Amendment excludes from Con-

[1] Houston E. & W. Texas Ry. Co. v. United States, 234 U.S. 342.

gressional regulation (see Pet., pp. 10-14). Specifically, respondents have offered no justification whatsoever for denying to the employees involved in the LIRR's freight business the right to strike guaranteed by the RLA, which is expressly recognized in Taylor, 353 U.S. at 566. The assertion at p. 5 of the Brief in Opposition that "RLA coverage had not been conducive to labor peace on the railroad during the fourteen years of state ownership" is nothing more than disagreement with the judgment of Congress, carries no constitutional weight, and is in any event contrary to the facts (see Pet., p. 17). In sum, it is not the function of a court of appeals to overrule or limit this Court's precedents (such as *Taylor*) on the supposed authority of a decision (*National League*) which expressly preserved those precedents.

## CONCLUSION

For these reasons and those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Whether the operations of a state-owned railroad, found to be "a crucial physical link with other interstate rail carriers in the movement of interstate rail freight" as well as a provider of long- and short-haul passenger service, are constitutionally shielded from the provisions of the Railway Labor Act and other federal railroad laws under the doctrine of *National League of Cities* v. *Usery*.

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the Court of Appeals, reported in 634 F.2d 19, and the opinion of the District Court for the Eastern District of New York, reported in 509 F. Supp. 1300, appear in the Appendix to the Petition (hereinafter designated "Pet. App.") at pages 1a-26a and 29a-46a, respectively.

### JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1980 (Pet. App. 1a). A timely petition for a rehearing en banc was denied on December 17, 1980 (Pet. App. 27a). This Court granted the petition for writ of certiorari on June 22, 1981, and upon applica-

tion by petitioner, extended the time within which to file this Brief to September 3, 1981. The Court's jurisdiction is invoked under Section 28 U.S.C. 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution and the pertinent sections of the Railway Labor Act ("RLA"), 45 U.S.C. 151 *et seq.*, have been set forth in full at Pet. App. 83a, 57a, and in the Appendix to this Brief (hereinafter designated "App."), *infra* at 3a and 8a. The pertinent provisions of the New York Civil Service Law, Section 200-214 (the Taylor Law), are set forth in full at Pet. App. 49a, and in the appendix to the Respondents' Brief in Opposition to the Petition, at A1-A4.

## STATEMENT OF THE CASE

### A. The Parties

Petitioner[1] United Transportation Union ("UTU" or "the union") filed this action in the United States District Court for the Eastern District of New York for declaratory judgment to test whether the provisions of federal railroad labor relations law or the anti-strike provisions of the New York State Public Employees Relations Law (New York Civil Service Law, Section 200-214), apply to the Long Island Rail Road ("LIRR").

Petitioner UTU is an unincorporated labor organization, national in scope, representing the craft or class of conductors, brakemen, switchmen, firemen, motormen, collectors and related employees comprising the train crew on virtually every railroad in the United States, including

---

[1] The Brotherhood of Locomotive Engineers, Railroad Yardmasters of America, Brotherhood of Railroad Signalmen, Brotherhood of Railway Carmen, International Association of Machinists and Aerospace Workers, *amici curiae* in the Court below, join in the views expressed herein.

the LIRR, pursuant to the provisions of the Railway Labor Act. UTU has been certified and recognized by the National Mediation Board as the exclusive collective bargaining representative under the Railway Labor Act for those employees within the said craft or class employed by the LIRR. It is a party to collective bargaining agreements with the LIRR governing rates of pay, rules and working conditions of employees represented by it which were negotiated and are maintained in accordance with the requirements of the Railway Labor Act, 45 U.S.C. 151 *et seq.*

Respondent LIRR is a class I railroad engaged in business as a common carrier by rail in interstate commerce subject to the provisions of Part I of the Interstate Commerce Act (49 U.S.C. § 10101 *et seq.*) and is a "carrier" within the meaning of that term as defined in the Railway Labor Act. The LIRR is an integral part of the nationwide railway system of the United States and is subject to the provisions of the Interstate Commerce Act, the Railway Labor Act, and other federal railroad laws. It connects with other interstate railroads in the movement of freight in interstate commerce.

Respondent Metropolitan Transportation Authority ("MTA"), an agency of the State of New York, controls LIRR as one of its wholly owned subsidiaries.

### B. The Proceedings Below

On December 7, 1979, UTU filed this action in the District Court for the Eastern District of New York for a declaratory judgment that the LIRR was subject to the Railway Labor Act, and that the Railway Labor Act occupied the entire field of labor relations of railroads engaged in interstate commerce to the exclusion of state law, in this case the Taylor Law; and for an injunction to protect against Taylor Act intrusion into federally protected rights.

The district court granted petitioner's motion for summary declaratory judgment. It concluded that the Long Island Railroad is a carrier engaged in the transportation of freight in interstate commerce and is therefore subject to the Railway Labor Act (Pet. App. 36a). Further, it held (1) that "employees of the Railroad, who have exhausted the mandatory bargaining and mediation procedures outlined in the [Railway Labor] Act, have a federally guaranteed right to strike" (Pet. App. 39a); and (2) that the right to strike as guaranteed by the Railway Labor Act was not impaired by the fact that the employer was a state agency, relying upon *California* v. *Taylor*, 353 U.S. 553. (Pet. App. 38a).

The Court of Appeals reversed. It held that reversal was dictated by "the rationale of *National League of Cities* v. *Usery*, 426 U.S. 833" (Pet. App. 3a). It concluded that insofar as the application of the RLA to the LIRR "directly displaces the State's ability to structure employee-employer relationships and to make essential governmental decisions", it is not within the authority granted Congress by Article I, Section 8, Clause 3 of the Constitution (Pet. App. 14a). In reaching this conclusion, the court announced that the scope of essential government services for purposes of *National League* "is gauged not only in terms of the nature of a public service, but also its availability in the marketplace" (Pet. App. 22a). The court recognized that "the LIRR's freight service provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (Pet. App. 9a), but in applying the balancing test, it struck the balance in favor of the State interest (Pet. App. 25a).

### C. The Challenged Federal Statute

Although the implication of this case upon the application of federal laws to state-acquired enterprises is far-reaching, the targeted statute here is the Railway

Labor Act. Enacted more than 50 years ago, it states its general purposes to be:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a (*see* Pet. App. 59a).

The Railway Labor Act has been the subject of decisions of this Court in a long line of railroad cases dating back more than fifty years. *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, decided in 1930, upheld the constitutionality of the Act, holding, among other things, that "the major purpose of Congress in passing the Railway Labor Act was 'to provide machinery to prevent strikes'" (*Id.*, at 565) and in so doing "does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them." *Id.*, at 571. As this Court has noted from time to time, in its numerous decisions on this subject[2] "the

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[2] The Act's major-dispute procedures and status quo requirement were concisely stated in *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969):

> The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2

Act established rather elaborate machinery for negotiation, mediation and voluntary arbitration, and conciliation". *Detroit, Toledo, & Shoreline R.R. Co.* v. *United Transportation Union*, 396 U.S. 142, 148-149.

> It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted. . . A final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process. As we noted in *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966), 'the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute.'

*Id.*, at 149 (citations omitted). For a diagram of these procedures, *see* App. D, *infra*, at 4a.

The 97th Congress in its first session extended this "interminable process" of Section 6 for the resolution of disputes involving state owned and operated commuter railroads by an additional period of at least 240 days during which the President is required, upon request by the governor of an affected state or by the parties, to establish not only an Emergency Board under

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Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.

Section 10, but failing dispute resolution at that stage, a final offer selection Emergency Board (*see* App. C and F *infra*, at 3a, 8a). The *status quo* time span within which the Section 10 Board will operate has been doubled from 60 days to 120 days. The *status quo* period during which the second or final offer selection Emergency Board will operate consumes another 120 days or 240 days overall, in addition to the long time span during the usual negotiation and mediation.

The final offer selection board recommends to the President the more reasonable of the final offers submitted by the carrier and the union. *See* App. F, *infra*, at 8a-10a. The party rejecting the selected offer is penalized in the event of a work stoppage. The employees who engage in a work stoppage following their rejection of the selected final offer forfeit benefits under the Railroad Unemployment Insurance Act. The carriers upon their rejection would lose benefits under a mutual aid strike pact.

The Court in *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 390, concluded that the Railway Labor Act permits the parties to a railway labor dispute to engage in self-help, "free from State interference" after exhaustion of the "interminable" Railway Labor Act procedures.

### D. The New York Public Employees Relations Law (the Taylor Law)

The New York Taylor Law, enacted in 1967, establishes a labor relations system for public employees (*see* Pet. App. 49a). It prohibits strikes by certain employees of New York State and its local subdivisions, and provides procedures for the imposition of fines or other penalties (Sec. 210, *Id.*, at 49a). It provides no substitute for the resolution of an impasse in collective bargaining. It grants public employees the right to

organize and to be represented in collective bargaining by employee organizations of their own choosing. It is administered by a three-member Public Employee Relations Board, which has the responsibility to resolve disputes concerning the representative status of employee organizations, to investigate and remedy improper employer or employee organization practices and to establish and administer procedures for the resolution of collective bargaining disputes, including the establishment of fact finding boards authorized to make public recommendations. If mediation and fact-finding fail to settle a dispute, the matter is referred to the legislative body for a public hearing and for such action as it may deem necessary.

The Taylor Law, as originally enacted, did not extend to employees of state-owned subsidiary corporations, such as LIRR. Thus, it was not until February 8, 1980, when respondents converted LIRR from a private corporation to a public benefit corporation within the meaning of the Taylor Law, that the issues presented by this case arose (*see* District Court opinion, Pet. App. 31a).

### E. Facts

As appears from the averments by LIRR in the various federal district court complaints it has filed, the LIRR is:

> . . . a Class I steam railroad . . . engaged in business as a common carrier for hire in the transportation of passengers and property in interstate and foreign commerce, subject to the Interstate Commerce Act, and also intrastate commerce within the State of New York, and is a "carrier" within the meaning of that term as defined in the Railway Labor Act.[8]

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[8] *E.g.*, complaints filed in *LIRR* v. *UTU*, Civ. Action No. 75-C-747 (E.D.N.Y. 1975); *LIRR* v. *Brotherhood of Locomotive Engineers*, Civ. Action No. 74-C-102 (E.D.N.Y. 1974); *LIRR* v. *System Federation No. 156*, Civ. Action No. 68-C-688 (E.D.N.Y. 1968).

It has likewise averred in its complaints that "[t]he railroad is an integral part of the nationwide railway system and connects and interchanges freight and passengers with other railroads" (*Id.*, footnote 3).

The character of the LIRR's operations reflects the physical structure of the island whose industries and people it serves. Long Island is an elongated insular projection paralleling the entire length of the State of Connecticut. It is bounded on the north by Long Island Sound, separating it from Connecticut's south shores. The Atlantic Ocean is on its east and south and the Narrows, New York Bay and the East River form its west and northwest boundaries. Seventeen hundred square miles in size, it is larger than the state of Rhode Island. Its length is approximately 118 miles, its width, 23 miles (*see* App. A, *infra*, at 1a).

It is divided into four counties, two of which, Suffolk and Nassau, encompass most of its land mass. The combined population of these two counties exceeds 2.6 million and ranks ahead of one fifth of all the states in the United States.[4] These counties are classified by the United States Bureau of the Census as a standard metropolitan statistical area, the ninth largest in the nation.[5]

The two remaining counties on the island, Kings and Queens, occupy a small segment of the island at its western tip. They are each boroughs of New York City.

From points within these counties on its western end, the island connects with Manhattan Island and the mainland by a series of bridges. On its eastern end it is linked with Connecticut by vehicle carrying ferries.

The LIRR radiates throughout this entire land mass with 211 miles of main line track and 101 miles of

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[4] New Hampshire, Vermont, Rhode Island, North and South Dakota, Wyoming, Idaho, Montana, Alaska, and Hawaii.

[5] *Statistical Abstract Supplement, State and Metropolitan Area Statistical Data Book*, U.S. Bureau of the Census, (1979), at 522.

branch line track, serving the towns and cities of Long Island. The most remote point of its service is the town of Montauk, the island's end point, more than 100 miles or about three hours distant from Manhattan.[6] *See also* App. B, *infra*, at 2a.

For this extensive area, LIRR is "the only common carrier railroad serving the traveling public and the numerous industries located . . . in the Counties of Nassau and Suffolk [and] is the principal common carrier railroad serving the residents of the County of Queens and the thousands of industries in that County" (averments of LIRR, contained in the complaints referred to at footnote 3, *supra*). The District Court below accordingly found that LIRR "is a necessary physical link with other railroads in the movement of a heavy volume of interstate freight via the New York City gateway between Long Island and other parts of the United States" (Pet. App. 35a; *see also* App. B). The Court of Appeals agreed, saying: "The LIRR's freight service provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (Pet. App. 9a).

LIRR is one of the oldest railroads in the United States, having been incorporated on April 24, 1834. In 1966, New York State acquired ownership of LIRR through the respondent Metropolitan Transportation Authority, by stock purchase from the Pennsylvania Railroad Company.[7] The LIRR employees remained private

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[6] *Moody's Transportation Manual* (*see* Record, hereinafter designated "R", at 410).

[7] According to the records of the United States Department of Transportation, the federal government has approved application for LIRR grants providing millions of dollars since its acquisition by the State to improve and modernize LIRR service. The figure compiled by the Department exceeds $450,000,000 for the period 1967 to 1980 (*see* R. 319; *see also Moody's Transportation Manual*, R. 410).

employees until February 8, 1980 when the MTA converted LIRR into a public benefit corporation. *See* discussion *infra*, at 40.

For the year ending December 31, 1979, LIRR generated more than $19 million from its freight operations[8] serving "numerous Long Island concerns, such as aircraft manufacturers, supermarket chains, building suppliers, food processors, and farms" (Pet. App. 34a).

Its freight includes coal, building materials, chemicals, heavy equipment, aircraft parts, radioactive material, paper products, petroleum, and farm products (Joint Appendix, hereinafter designated "J.A.", at 24-25). Its freight cars are hauled by diesel locomotives (J.A. 25).

In that same year, 1979, it reported the movement of 70,365 loaded freight cars in through trains and delivered an additional 52,283 loaded cars to rail siding throughout Long Island.[9] In transporting these cars in and out of Long Island, LIRR interchanged "with more than a dozen . . . carriers" (Pet. App. 34a), bearing the identification marks of interstate railroads from every section of the United States (*e.g.*, the Santa Fe, Southern, Florida East Coast, Maine Central, Great Northern, Union Pacific, Conrail, Norfolk & Western, Canadian Pacific, Canadian National, Chicago Northwestern, Bur-

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[8] LIRR Report for 1979 to the Interstate Commerce Commission, ("ICC"), Form OS-B, (Item 3, Line 3). *See also* J.A. 33. The court below cites a lower figure based upon an adjustment for a freight surcharge related to the Railroad Retirement Tax (*see* Pet. App. 4a; J.A. at 49-50).

[9] LIRR Report for 1979 to ICC, Form OS-A, Items 13-02, 13-03, Lines 150, 151. At the trial respondents gave a lower estimate of 40,936 cars in 1979 (J.A. at 34-36). The District Court found the differences "not material" since the lower figures "provide substantial support for the conclusion that the Railroad 'is a necessary physical link with other railroads in the movement of a heavy volume of interstate rail freight via the New York City gateway between Long Island and other parts of the United States.'" Pet. App. 35a, (citation omitted).

lington) (*see* J.A., at 25) moving over more than two million car miles[10] throughout the island.

This interconnection of interstate rail carriers reflects the regional nature of the national rail network, with interstate long-haul freight movements usually involving more than three railroads, sharing a national freight-car pool.[11] The hubs of these interstate rail movements in Long Island and throughout the entire national rail system are the yards where the freight cars are delivered, serviced, and made up into trains moving to common intermediate or final destinations. Whenever a car is set off from a train moving into or out of these yards, the car is reswitched and consolidated with other traffic into a block of freight cars and eventually joined to a train. This interchange procedure is repeated from yard to yard until the car reaches its final destination.[12]

At all times prior to the exigencies of this law suit, LIRR has considered itself a carrier subject to federal railroad laws applicable to railroads in interstate commerce.[13] *See* Pet. App., at 31a, 35a-36a. As Judge Mishler in the court below found:

> [LIRR] has consistently filed reports required by the Interstate Commerce Act with the ICC. In addi-

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[10] Bureau of Accounts, Interstate Commerce Commission, *Financial and Operating Statistics, Class I Railroads*, Statement No. 100 (1978), at 12 (J.A., at 56).

[11] *National Transportation Trends and Choices*, United States Department of Transportation, (1977), at 183.

[12] *Id.*, at 204.

[13] *E.g.*, Interstate Commerce Act, 49 U.S.C. 10501; Railway Labor Act, 45 U.S.C. 151; Railroad Retirement Act, 45 U.S.C. 231; Railroad Unemployment Insurance Act, 45 U.S.C. 351; Rail Safety Improvement Act, 45 U.S.C. 39; Railroad Boiler Inspection Act, 45 U.S.C. 22; Federal Employers' Liability Act, 45 U.S.C. 51; Labor-Management Report and Disclosure Act, 29 U.S.C. 401; Rehabilitation Act of 1973, 29 U.S.C. 794; Norris-La Guardia Act, 29 U.S.C. 101; Railroad Reorganization Acts, 11 U.S.C. 205; Regional Rail Reorganization Act, 45 U.S.C. 701; Railroad Revitalization and Regulatory Reform Act, 45 U.S.C. 801.

> tion, its employees have consistently received benefits of the Railroad Retirement Act, the Railroad Unemployment Insurance Act, and the Federal Employees [sic] Liability Act. Moreover, in the dispute which lies at the heart of this action, the Railroad has affirmatively sought to invoke the collective bargaining and mediation procedures set out in the Act, including the establishment of a Presidential Emergency Board. (Pet. App. 36a).

In addition to its interstate freight operations, LIRR has, like other Class I railroads, historically provided passenger service over the length and breadth of Long Island. In its passenger service it uses both diesel-hauled coaches and parlor and sleeping cars, as well as self-propelled rail motor cars (J.A. 25, R. 120-121; *see* Pet. App. 34a). This service includes the transportation of regular passengers traveling daily between home and work over short distances within commuting range as well as other passengers traveling as occasion requires between points as distant as 100 miles including the outermost points of Suffolk County. By LIRR's own estimate, the daily commuter group number 90,000 (J.A. 35), less than 4% of the 26 million population of Nassau and Suffolk Counties (U.S. Census, 1980), and about one half of this percentage if the population of Queens County is included. In its 1979 report to the Interstate Commerce Commission, LIRR showed the annual revenue derived from the commutation short-haul group to be approximately $71 million, and that from the basic fare group to be approximately $55 million,[14] a ratio of about five to four.

LIRR is unique in that it is the only state owned and operated Class I railroad in the United States carrying both interstate freight and the travelling public. Except for short-haul services into New York,[15] passenger com-

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[14] LIRR Report for 1979, ICC Form OS-B, Items 4-01, 4-02, and 4-03, lines 5-7, based on the sale of commutation and multi-ride tickets as compared with regular fare tickets.

[15] PATH, owned by a bi-state authority carries short-haul interstate passengers between New York City and northern New Jersey.

mutation services are provided by 12 privately owned or operated interstate railroads to and from metropolitan centers in Illinois, Massachusetts, New Jersey, Pennsylvania, Michigan, and California.[16]

The collective bargaining negotiations central to this dispute were conducted prior to the amendment of the Railway Labor Act of August 13, 1981, providing a special procedure for publicly funded and publicly operated railroad carriers providing commuter service.[17] They followed the form prescribed by the Railway Labor Act, as then in effect, as had all prior negotiations on this and all other interstate railroads since the passage of the Railroad Labor Act in 1926.

The long drawn-out traditional procedures providing the framework for collective bargaining in the railroad industry are summarized above. *See also* App. D, *infra*, at 4a. Unlike practices in industrial labor relations generally, agreements in the railroad industry are of indefinite duration. The contracts do not expire. Moratorium dates are customarily established which govern the period within which modification of provisions of an agreement cannot be processed. Upon expiration of the moratorium period, the railroads or the labor organization may serve a written notice under Section 6 of the Act identifying what, if any, changes, affecting rates of pay, rules or working conditions, it proposes to negotiate within the constraints of the Railway Labor Act procedures.[18]

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[16] *Transit Fact Book*, American Public Transit Association, (1978-1979 ed.), at 74-75; (R. 403-404). The twelve carriers are the Baltimore & Ohio, the Burlington Northern, the Chicago & North Western, the Milwaukee, the Chicago Rock Island, the Chicago South Shore, the Illinois Central, the Boston & Maine, Grand Trunk Western, Norfolk & Western, Pittsburgh & Lake Erie, and the Southern Pacific. *Id.*

[17] Omnibus Budget ReconciliationAct of 1981, P.L. 97-35, Title XI, § 1157, reproduced in App. F at 8a (*see supra*, at 6-7).

[18] See generally *The Railway Labor Act at Fifty*, National Mediation Board (U.S. GPO, 1977), at 71 *et seq.*

Petitioner served its Section 6 notices which triggered the RLA procedures on June 29, 1978, November 1 and 15, 1978, December 15, 1978, and February 16, 1979. (J.A., at 28). The RLA procedures ran their full course during the following months until April 11, 1980 when the dispute was settled (Pet. App. 6a, n.6). Throughout the 22 months intervening from service of notice to settlement, all aspects of the statutory procedures were applied. When the initial effort to settle their differences by conference failed, UTU and LIRR filed a joint application with the National Mediation Board ("NMB") on April 5, 1979. When seven months of mediation fell short of producing an agreement, the NMB terminated mediation and proffered arbitration (J.A., at 29). The action of releasing the case from mediation triggered a 30-day status quo period pursuant to Section 5 of the Act. *Id.* Efforts to settle the dispute continued throughout this phase. On December 8, 1980, the train employees represented by petitioner withdrew from LIRR service, the 30-day moratorium period having expired. *See* J.A., at 21-22, 29.

The work stoppage ended six days later on December 14, 1980 when President Carter, upon a finding that the LIRR work stoppage threatened "substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service" issued Executive Order 12182 under Section 10 of the Act. The order established Presidential Emergency Board 12182 "to investigate and report" respecting the dispute. Its effect under the Act was to impose a second status quo or moratorium period, prohibiting the continuation of the work stoppage for an additional 60 days.[19] *See* App. C, *infra*, at 3a.

Hearings before the Presidential Emergency Board were held and a report was filed in due course.[20] J.A., at

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[19] J.A. at 29.

[20] On March 4, 1980, Chief Judge Jacob Mishler of the U.S. District Court for the Eastern District of New York granted petition-

29. Thereafter, on April 11, 1980, the dispute, which underlay this action, was settled.[21] Pet. App., at 6a, n.6.

## SUMMARY OF ARGUMENT

The courts below have each concluded that the Long Island Rail Road "is a necessary physical link with other railroads in the movement of a heavy volume of interstate freight via the New York gateway between Long Island and other parts of the United States." (Pet. App. 35a, 34a, 9a). Yet the decision of the Court of Appeals holds that the State of New York, in acquiring owner-

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er's motion for summary judgment and contemporaneously issued a permanent injunction restraining LIRR and MTA from pursuing its state court Taylor Law action and further restraining UTU from engaging in any work stoppage pending ultimate disposition of this case (Pet. App., at 47a-48a).

[21] On March 9, 1980, the National Mediation Board issued an interim order, announcing that, pending action by this Court in this case, it will withhold its mediatory services from contract disputes involving LIRR and its sister subsidiary, the Staten Island Rapid Transit Authority ("SIRTOA"). *See* Pet. App., at 63a. In the Board's view the decision of the Second Circuit vitiates only that part of RLA which, under the court's holding, "impairs the State's ability to structure employer-employee relationships" of LIRR, by "eliminat[ing] a key [no strike] provision in the State's legislative effort to provide its citizens with continuous public transportation" (Pet. App. 3a, 14a). NMB accordingly announced that it will continue to process LIRR representational cases under the RLA (Pet. App. 71a). Similarly minor disputes will continue to be processed under the compulsory arbitration provisions of the Railway Labor Act. *Id.*

Respondents MTA and LIRR, joined by SIRTOA, have filed an action for declaratory judgment in the federal court for the Eastern District of New York, challenging the National Mediation Board's position as to the limited scope of the Second Circuit's decision. *Metropolitan Transportation Authority et al.* v. *National Mediation Board*, Civ. 81-0721, (E.D.N.Y. filed March 11, 1981). LIRR has more recently filed a petition under the Taylor Law with the New York Public Employees Relations Board, requesting the holding of an LIRR employees' representation election in a single overall company unit. *LIRR Petition for Decertification*, Case No. C-2271 (N.Y. Public Employment Relations Board, filed June 1, 1981).

ship, effectively removed the railroad from the application of the Railway Labor Act and other related federal railroad laws. The decision is directly contrary to the decisions of this Court holding that interstate railroads operating within the continental rail network, "long recognized as the objects of national concern and regulation" (*Piedmont & Northern Railway Co.* v. *ICC*, 286 U.S. 299, 306), remain subject to federal railroad laws of general application when acquired and operated by a State. *California* v. *Taylor*, 353 U.S. 553; *United States* v. *California*, 295 U.S. 175; *Parden* v. *Terminal R. Co.*, 377 U.S. 184. These decisions were explicitly confirmed in *National League of Cities* v. *Usery*, 426 U.S. 833, 854 n. 18 in which the Court declared that:

> The holding in *United States* v. *California* . . . is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in 'common carriage by rail in interstate commerce'.

It was long ago settled by this Court that the commerce power includes the power "to control . . . all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Houston E. & W. Texas Ry. Co.* v. *United States*, 234 U.S. 342, 351 (*"Shreveport Rate Case"*).

An examination of the history of the railroad network establishes that the railroad industry has long been regarded as "a railroad world", "a 'state within a state' " with a large distinctive population with "its own customs and its own vocabulary . . . and . . . rules of its own

making . . .". *California* v. *Taylor*, 353 U.S. at 565. A growing concern with the chaotic conditions which plagued the early railroad industry in this country produced the Interstate Commerce Commission in 1887, followed by an increasing number of federal legislative responses to a wide range of national railroad problems, including the statute here in question, the Railway Labor Act. The wealth of railroad litigation involving these laws before this Court over the past hundred years attests to the extent of the national interest in the effective operation of the national rail network in its entirety.

In its recent session, Congress amended the Railway Labor Act to give further expression to the national concern in the operation of railroads like the LIRR by establishing a "Special Procedure" for "publicly funded and publicly operated carrier[s] providing rail commuter service." These new provisions require an additional extended period after exhaustion of the Section 6 and the new 120-day Section 10 procedures, in which the parties must submit "final offers". An additional 120 days of "final offer" hearings and deliberations are mandated in which the Board chooses the more "reasonable" of the offers. The parties must then either accept the Board's decision or suffer penalties in the event of a work stoppage following rejection. Omnibus Budget Reconciliation Act of 1981, Section 1157 (*see* App. F, *infra*, at 8a).

The court below held that the takeover of the LIRR by New York in 1966, and more specifically, its conversion into a public benefit corporation in 1980, removed it from the reach of federal laws affecting railroads, under the reasoning of *National League of Cities*. It rested its decision on the ground that LIRR, although functioning as a "crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (Pet. App. 9a), also serves as an important physical link in the movement of commuters from Long

Island into New York City. The court in deviating from *California* v. *Taylor* expanded the narrow holding of *National League of Cities* in derogation of its expressly stated exclusion of interstate railroads as noted above.

This Court in *National League* limited the Tenth Amendment immunity to the application of federal statutes "insofar as . . . [they] . . . operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" so as to "impair the States' 'ability to function effectively in a federal system' ". 426 U.S. at 852 (citation omitted). These express limitations have since been paraphrased by this Court in the form of the three requirements set out *infra*, at 36. *Hodel* v. *Virginia Surface Mining Association*, —— U.S. ——, 49 U.S.L.W. 4654, 4660. The instant claim satisfies none of them. (1) The Railway Labor Act does not regulate the States "as States"; it regulates interstate railroads, however owned. (2) It is not addressed to matters that are "indisputably attributes of sovereignty". (3) It does not impair the States' ability "to structure integral operations in areas of traditional functions".

The operation of the LIRR is not an "integral" operation of the government of New York. The LIRR functions precisely as it did before it was acquired by the State. The takeover simply effected a change in ownership. To say that the LIRR became an integral part of government merely because the State converted it to a public benefit corporation is to deprive the words of limitation in *National League* of all substantive content.

There is likewise no rational basis for the conclusion below that the LIRR meets the "tradition" test of *National League*. The United States has a long and pervasive practice of leaving railroading to the private sector. Sporadic individual ventures by a few States into direct railroading do not create a "tradition" in any reason-

able sense of that term. Nor can we have one "tradition" in one State and another in other States, each determining the scope of the federal authority to provide nationwide protection for the interstate network of rail transportation.

The States' "freedom to structure [their] integral operations" (426 U.S. at 852) is not impaired by the Railway Labor Act. The Tenth Amendment protection is limited to those operations which are " 'essential to [the States'] separate and independent existence' ". 426 U.S. at 845. The decision below would extend the criteria of essentiality to those services deemed by a State to be essential to interests of the local population because of the unavailability of such service "in the marketplace" (Pet. App. 22a). The Constitution, however, does not make market conditions the determinant of the line between federal and state authority. Nor does it require that an otherwise valid nationwide program for the protection of interstate commerce be subject to the particular "conception of public advantage" of each individual State. *Cf. Helvering* v. *Powers*, 293 U.S. 214, 227.

In *National League* the statute in question was deemed by the Court to substitute federal determinations for state determinations concerning the wages and the hours of state employees. The Railway Labor Act, in contrast, imposes no substantive standards limiting the railroads in the terms of employment they can offer. It simply requires the railroad to negotiate with its employees' representatives. *Virginia Ry. Co.* v. *System Federation*, 300 U.S. 515, 519. It does not compel agreement; the choice remains with the railroad, public or private, to decide on the terms it is willing to grant.

The Railway Labor Act is the instrument selected by Congress to avoid railroad interruptions due to labor disputes. It is based on the Congressional conclusion that the availability of ultimate economic force is a nec-

essary condition of the effectiveness of the collective bargaining machinery designed by Congress as the means of achieving that end. *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380-81. In contrast, the State of New York has chosen to prohibit strikes. This is a difference in judgment, in a field of overlapping jurisdiction, of no more Tenth Amendment significance than that considered in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 and in related federal preemption cases, which under the Supremacy Clause must be resolved in favor of the federal legislation. *Virginia Surface Mining*, *supra*, 49 U.S.L.W. at 4660. "The determination of the permissible range of self-help 'cannot be left to the laws of many States' ", for a railroad strike in one state affects the movement of freight in other states. *Jacksonville Terminal*, *supra*, 394 U.S. at 381. " 'The needs of the subject matter manifestly call for uniformity' ". *Id.* (citations omitted).

The fact, relied on by the court below, that the LIRR carries commuter passengers as well as interstate freight, does not alter the case. It is long settled that:

> Wherever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.

*Shreveport Rate Cases*, *supra*, 234 U.S. at 351-52.

## ARGUMENT

### I. THE LIRR REMAINED, AFTER ITS ACQUISITION BY THE STATE, AN INTEGRAL PART OF THE NATIONWIDE RAILROAD NETWORK AND ITS OPERATIONS THEREFORE CONTINUED TO BE WITHIN THE WELL-ESTABLISHED AUTHORITY OF THE FEDERAL GOVERNMENT TO PROTECT AND REGULATE INTERSTATE COMMERCE.

As the court below recognizes, the LIRR "provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" [22] (Pet. App. 9a). This conclusion conforms to averments of LIRR in its complaints in a long series of earlier federal court actions that it "is an integral part of the nationwide railway system and connects and interchanges freight and passengers with other railroads" (Statement of the Case, Part E, *supra*, at 8-9).

The LIRR has always carried freight as well as passengers from the earliest days of the federal involvement with the national railroad industry. It is nowhere suggested that the role of the railroad as "an integral part of the nationwide railway system" changed in any respect upon the State's acquisition of the railroad as a going concern in early 1966. In fact, the railroad at the time of purchase, speaking through Vice-President Shultz, proclaimed that:

> Absolutely nothing has changed . . . People are pounding the same typewriters and pulling the same switches as they always have.
>
> We just have a new owner and new board of directors. We are under the Railway Labor Act just

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[22] The district court, in its findings, similarly characterized the operation of LIRR as " 'a necessary physical link with other railroads in the movement of a heavy volume of interstate rail freight via the New York City gateway between Long Island and other parts of the United States' " (Pet. App. 35a).

> as we've always been. The people do not become state employees; they remain railroad employees and retain all the benefits and drawbacks of that.[23]

Nor did the take-over by the State change the nature of the services supplied by the LIRR to the "thousands of industries" [24] on Long Island. LIRR continued to operate its diesels, freight cars, passenger coaches, parlor cars, sleeping cars and its self-propelled coaches over its 325-mile rail system, serving an area larger than the state of Rhode Island and more populous than one fifth of the states in the Union (J.A. 25-26, and R., at 120-21).

It continued to interchange freight "with more than a dozen other railroads," directly or indirectly handling, servicing, yarding and delivering freight cars from and to other states (Pet. App. 34a). In 1979, it reported to the ICC that it handled the movement of more than 70,000 loaded freight cars in through trains and more than 50,000 loaded cars to rail sidings which together with the movement of empty freight cars involved more than 2 million miles of freight car transportation. *See* Statement of the Case, Part E, *supra*, at 11.

This Court has observed that "[t]he country's railroads long ago . . . adopted the practice of shipping the same loaded car over connecting lines to its ultimate destination. The freight cars of the Nation thus became in essence a single common pool, used by all roads." *United States* v. *Allegheny-Ludlum Corp.*, 406 U.S. 742, 743. *See also United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224.[25] The LIRR cars are part of

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[23] App. E, *infra*, at 5a-7a.

[24] As characterized by LIRR. *See* Statement of the Case, Part E, *supra*, at 8-9.

[25] According to a Department of Transportation study, "[a] typical freight car requires about 24 days between loads and spends only 14% of that in a line-haul move (8% loaded and 6% empty). The rest of the time is spent in yards and terminals . . . Since over

that common pool, carrying the logos of rail carriers from the four corners of the continental United States: the Southern, the Maine Central, the Union Pacific, the Santa Fe, along with numerous other national and Canadian railroads (J.A. 25).[26]

That the Interstate Commerce Act, the Railway Labor Act, the Federal Railroad Safety Act, the Railroad Retirement Act, the Hours of Service Act, the Federal Employers' Liability Act, and the other federal railway laws have historically applied to LIRR as a part of this network is not in issue. LIRR has at all times prior to February 8, 1980, considered itself a carrier subject to all of these laws (Pet. App. 35a-36a). As the district court stressed in its opinion, "in the dispute which lies at the heart of this action, the Railroad has affirmatively sought to invoke the collective bargaining and mediation procedures set out in the [Railway Labor] Act, including the establishment of a Presidential Emergency Board" (Pet. App. 36a).

The decision below holds that the LIRR is immune from the the Railway Labor Act on the ground that the operation of the LIRR is an exercise of the state's

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75% of loaded freight cars are currently handled by more than one carrier, improved equipment utilization and reliability is a goal that transcends the individual roads and applies to the entire railroad industry." *National Transportation Trends and Choices*, U.S. Department of Transportation, at 183 and 203.

[26] The interdependence of the railroad operations within this network is illustrated by the recognized need to maintain the continuous flow of cars within the pool. It was noted in *Allegheny-Ludlum*, *supra*, at 743-744, that the operation of the mechanics of the car-pool system contributed to the chronic shortage in the national supply of freight cars. The ICC procedure for establishing the incentive per diem charge to spur prompt return of outstanding cars was unsuccessfully challenged by LIRR in *Long Island Rail Road* v. *United States*, 318 F. Supp. 490 (E.D.N.Y. 1970).

sovereignty. In so concluding, the decision runs directly counter to the decisions of this Court, holding that interstate railroads, although owned and operated by a state, are nevertheless subject to federal railway legislation, including the Railway Labor Act. *California* v. *Taylor*, 353 U.S. 553; *United States* v. *California*, 295 U.S. 175; and *Parden* v. *Terminal R. Co.*, 377 U.S. 184. This line of decisions was reaffirmed in *National League of Cities*, 426 U.S. 833, 854, n. 18.[27] *See also Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 422 (Chief Justice Burger, concurring opinion).

*Taylor* sets to rest any doubt that the operation of a state-owned interstate railroad is constitutionally subject to the Railway Labor Act. The Court in *Taylor* described the Act as "essentially an instrument of industry-wide government." 353 U.S. at 565. It explained:

> The railroad world for which the Act was designed has been described as a 'state within a state. Its population of some three million, if we include the families of the workers, has its own customs and its own vocabulary, and lives according to the rules of its own making .... This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its

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[27] Note 18 of *National League* reads:

> The holding of *United States* v. *California*, as opposed to the language quoted in the text, is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce ...." 297 U.S., at 182.
>
> For the same reasons, despite MR. JUSTICE BRENNAN'S claims to the contrary, the holdings in *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), and *California* v. *Taylor*, 353 U.S. 553 (1957), are likewise unimpaired by our decision today.

> component parts, the reign of law has been firmly estabilised . . .'. [t]he fact that, under state law, the employees of the [state-owned and operated] Railroad may have no legal right to strike reduces, but does not eliminate, the possibility of a work stoppage. It was to meet such a possibility that the [Railway Labor] Act's 'reign of law' was established. A terminal railroad facility like the [state-owned] Belt Railroad is a vital link in the national transportation system. Its continous operation is important to the national flow of commerce.

355 U.S. at 565-66 (footnote and citations omitted).

The factual situation to which the Court in *California* v. *Taylor* referred is essentially parallel to that of this case. The New York Taylor Law, as its record shows since its inception, only "reduces, but does not eliminate, the possibility of a work stoppage."[28] *Id.* The "reign of law" under the Railway Labor Act, which, when enacted, was a composite of the major voluntary features of railway labor laws and practices, dating from 1888, has served to avoid interruptions to the flow of interstate rail freight throughout the country and in New York as well.

The railroad world which the *Taylor* decision describes came into existence as the national railroad network

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[28] The records of the New York Public Employment Relations Board show that during the period September 1967 to December 31, 1980, there were 279 strikes by public employees subject to the Taylor Law, with an estimated 4,105,000 work days idle (Pet. App. 77a), and in the case of public transit employees subject to that law, nine strikes, causing 370,500 idle work days. *Id.*

In contrast, there was a single work stoppage by employees of LIRR (November, 1972) between the *fiscal* years 1965 (when LIRR was purchased by the state) and 1980 (and prior to December 7, 1979 when this action was filed), causing 175,000 idle work days (*see* Pet. App. 81a). The dispute which gave rise to this case resulted in a six-day strike in December, 1979, by employees represented by petitioner and a two day strike in April, 1980, by other LIRR employees, together causing 24,000 man days lost (*Id.*).

began its accelerated evolution in the late 19th century, closely aligned with the changes and growth in the United States during that period. As the rail network developed and began to dominate important segments in the American economy, problems of "rate wars, price fixing, secret rebates to favored shippers, bankruptcies, financial swindles, blatant political bribery, discrimination between long-haul and short-haul shippers, [and] indiscriminate handing out of free railroad passes" contributed to the general instability of the young industry, evoking the attention of both the state and national legislatures.[29] In the two years prior to 1887, 150 bills to create some form of government regulation of railroads were introduced in the Congress. *Id.*

Along with this growing lack of public confidence in the management of the railroad industry, the operating brotherhoods of railway employees, predecessors to petitioner UTU, began as early as 1860 to organize operating employees in response to the hazardous conditions in the occupation of running these early railroads.[30] The last quarter of the nineteenth century was a particularly bloody labor relations period, marked by the nationwide rail strike of 1877, and the great Pullman strike of 1894. *Id.*, at 10.

The Act to Regulate Commerce of 1887 (the Interstate Commerce Act), creating the Interstate Commerce Commission, represented the first significant federal response to the growing national concern over the protection of the public interest from the excesses of the railroads in their developing monopolies. Federal presence in the railroad industry began at this point and has persisted ever since, resulting in laws covering a wide range of pressing needs

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[29] J. Haar, *The Great Railway Crisis, An Administrative History of the United States Railway Association* (National Academy of Public Administration, 1978) at 5.

[30] *Id.*, at 9.

involving rate structures, division of rates, car-pooling, utilization of freight cars, rail safety, mergers, abandonments, employment relations and stability, retirement, and, of course, the movement of interstate freight without interruption.[31]

Railroad growth peaked during the second decade of this century with approximately 254,000 miles of line, representing the largest rail network in world.[32] The federal presence in the industry expanded in proportion to this enormous growth. Coordinate with the gradual strengthening of the ICC, and the growth of the early railroad laws, both state and federal, responding to the needs of shippers, farmers, and the needs of the railroads themselves, was the growth of the early federal labor relations laws, such as the Arbitration Act of 1888, the Erdman Act of 1898, the Newlands Act of 1913, the Adamson Act of 1916, and the Transportation Act of 1920.[33]

In 1919, Samuel O. Dunn, the editor of *The Regulation of Railways*, wrote that "the improvement of our policy of regulation of railways is the only alternative to government ownership." [34]

During 1923-24, the federal administration under Presidents Harding and Coolidge asked for improvement in the Transportation Act of 1920, to remedy shortcomings particularly in the area of labor management relations. *The Railway Labor Act at Fifty*, *supra*, at 7. It was in this context that the Republican Party platform of 1924 proposed the enactment of a Railway Labor Act, stating:

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[31] *Id.*, at 4-9.

[32] *Id.*, at 11.

[33] *The Railway Labor Act at Fifty*, National Mediation Board, (G.P.O., Washington, D.C. 1976), at 3-7.

[34] Samuel O. Dunn, *The Regulation of Railways* (New York: D. Appleton and Co., 1919), at 19.

> Collective bargaining, mediation, and voluntary arbitration are the most important steps in the maintaining of peaceful labor relations and should be encouraged. We do not believe in compulsory action . . . Therefore the interests of the public require the maintenance of an impartial tribunal which can in an emergency make an investigation of the facts and publish its conclusions.[85]

In 1925, a committee of railway executives met with a committee of union representatives and, under the urging of President Coolidge, produced a draft of a bill which ultimately became the Railway Labor Act. *Id.*, at 8. Donald R. Richberg, one of the authors of the draft, in his testimony on the bill said:

> I want to emphasize again that this bill is the product of a negotiation between employers and employees which is unparallelled, I believe, in the history of American industrial relations.
>
> For the first time representatives of a great majority of all the employers and all the employees of one industry conferred for several months for the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community. They are now asking to have this agreement written into law, not for the purpose of having governmental power exerted to compel the parties to do right but in order to obtain Government aid in their cooperative efforts and in order to assure the public that their interest in efficient continuous transportation service will be permanently protected.[86]

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[85] *The Railway Labor Act at Fifty*, *supra*, at 7.

[86] *Railway Labor Disputes*, Hearings Before the House Committee on Interstate and Foreign Commerce, 69th Congress, 1st Session, (1926) at 9.

The result of this effort was the Railway Labor Act of 1926, which, as amended from time to time, has served as the basis for labor management harmony and industrial peace in the railroad industry.

In *Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, the Court said, in upholding the preemptive effect of the Railway Labor Act on state anti-strike laws:

> Both before and after enactment of the Railway Labor Act, as well as during congressional debates on the bill itself, proposals were advanced for replacing this final resort to economic warfare with compulsory arbitration and anti-strike laws. But although Congress and the Executive have taken emergency *ad hoc* measures to compel the resolution of particular controversies, no such general provisions have ever been enacted. And for the settlement of major disputes, 'the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration'.

394 U.S. 369, 379-380 (footnotes and citations omitted).

In its comments upon this history in *Detroit, Toledo & Shoreline R.R. Co.* v. *UTU*, *supra*, 396 U.S. at 148, 149, this Court recognized that the most significant element of the Railway Labor Act's machinery for preventing wasteful strikes was the leverage given to the parties and to the government "to make the exhaustion of the Act's remedies an almost interminable process". *See*

*also Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246. In the instant case, 22 months of mediation, negotiation and Presidential Emergency Board intervention under the long drawn out procedures of the Act produced an accord (Pet. App. 6a, n.6).[37]

It is this long-term federal presence in the railroad world, responding to the national interest in the uninterrupted operation of the rail network in its entirety and not the state's interest in the functioning of its recently acquired freight and commuter railroad, which is deeply rooted as a traditional governmental activity. *See* discussion, *infra*, at 40-42. Obviously, this national concern extends to all railroads in the interwoven national system, mainline or short-line, privately owned or publicly owned, without distinction. This is the basis for this Court's rejection of California's argument in *Taylor*, that the federal railroad laws do not apply to state-owned railroads. *Id.*, at 25.

In the instant case, there can be no doubt that the economic character and significance of LIRR, character-

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[37] The effectiveness of the Act's mediatory process in the instant case was undoubtedly chilled by the tactic of LIRR and MTA to employ as their final weapon a state court Taylor Law injunction to forestall a possible stoppage. The chilling effect of that tactic was described by the National Mediation Board ("NMB") in its order of March 9, 1981, interpreting the decision of the Court below as superimposing Taylor Act sanctions on Railway Labor Act procedures:

> The statutory scheme is a comprehensive plan. Its components cannot be segregated and still have meaning. The possibility of the Board's terminating its mediatory services, with the consequences which flow from such action, is as much a part of this mediatory process as anything else. Yet by superimposing the Taylor Law anti-strike provisions upon the Board's mediatory services, the Court destroys the only real power that this Board has to induce compromise and ultimate agreement by the parties.

Pet. App. 70a (footnotes omitted).

ized by the court below as "a crucial physical link with other interstate rail carriers in the movement of interstate freight" (Pet. App. 9a), is at least as substantial as that of the state owned and operated railroads in *Taylor* and the related cases.

The court below sets aside the *Taylor* line of cases on the ground that the LIRR carries not only freight, but also a considerable number of commuter passengers. But the *Taylor* cases cannot be set aside on that ground.[38] The national concern in maintaining the free flow of interstate commerce over the nationwide rail network, including its integral branches and tributaries, cannot permit a distinction based on the volume of interstate freight carried, or on the additional carriage of commuters, or on the relative volume of the two services.[39]

Whatever the volume of LIRR's passenger service the inescapable fact is that the Long Island Rail Road, according to its ICC reports, moved more than 70,000 loaded freight cars on its through trains in 1979 and more than 50,000 loaded freight cars on its way trains (Statement of the Case, Part E, *supra*, at 11), over a distance of more than 2 million train miles, inclusive of empty freight cars (J.A. 56), and serves as the "necessary physical link with other railroads in the movement of a heavy volume of interstate rail freight" (Pet. App. 35a), regardless of the additional passenger function which it performs. It has long been settled that:

> The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount au-

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[38] In expressly confirming *Taylor* and the related railroad cases, *National League* cautions that "[t]he holding of *United States* v. *California*, as opposed to the language quoted in the text, is quite consistent with our holding today." 426 U.S. at 854, n.18.

[39] In this connection it should be noted that 53 of approximately 200 of the nation's urban centers border on or cross state lines. *See* H.R. Rep. No. 204, 88th Congress, 1st Sess. (1963), at 5.

> thority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care.

*Shreveport Rate Case, supra*, 234 U.S. at 351. Justice Rehnquist, in noting in his concurring opinion in *Hodel* v. *Virginia Surface Mining Association*, —— U.S. ——, 49 U.S.L.W. 4654, that "Congress' power under the Commerce Clause is broad indeed" (*Id.*, at 4665), referred, *inter alia*, to *Shreveport*, in which this Court declared that the commerce power included the power "to control . . . all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Shreveport Rate Case, supra*, 234 U.S., at 351. "The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.'" *Id.*, at 350.

The engagement of a state in historically private business activities "with a close and substantial relation to interstate traffic" is no more shielded from the commerce power than was the intrastate activity in *Shreveport*. Whenever the interstate and intrastate commuter transactions of carriers are so related as here "that the government of one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field." *Id.*, at 351-352.

In recognition of special problems in the public sector of railroad commuter operations, Congress has this year amended the Railway Labor Act by providing specialized and complex "final offer" procedures for the resolution of disputes on state-owned and operated commuter railroads.[40] The 1981 amendment prolongs what this Court has already characterized as the "interminable process" under Section 6 of the Act by imposing an additional 240-day moratorium period for the operation of the new dispute settlement machinery, following the exhaustion of the currently required Section 6 procedures. The amendment requires the President, upon the request of a party or a governor of any affected state, to create not only a Presidential Emergency Board described in Section 10 of the Act, but, absent resolution of the dispute upon conclusion of this first phase, a *second*, final-offer selection Presidential Emergency Board. The moratorium period for the First Emergency Board mediation is extended from 60 days to 120 days. The second final-offer selection Emergency Board mandated by the 1981 amendment occupies an additional 120-day moratorium period to permit the Board to select the more reasonable of the parties' final offers, for recommendation to the President, constituting a total of 240 days overall beyond the "interminable process" of the conventional Section 6 procedures. If the employees engage in a work stoppage after rejecting the selected final offer, they will forfeit benefits under the Railroad Unemployment Insurance Act. A work stoppage following a carrier's rejection of the selected final offer operates as a forfeiture of benefits under any mutual aid pact which it may have. *Id.*

The overriding need for a continuing federal presence in response to national concerns over the free flow of interstate rail traffic throughout the entire network, as exemplified by the 1981 amendment, must be held to

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[40] Omnibus Budget Reconciliation Act of 1981, Title XI, § 1157, App. F, *infra*, at 8a.

predominate over the interest of a State in maintaining local rail service. The State's interest in providing commuter service to short-haul passengers by a conventional interstate railroad serving an area as large as Long Island can hardly be deemed to involve the performance of historical functions " 'essential to [the] separate and independent existence' " of the State. *National League of Cities, supra*, 426 U.S. at 845. The fact that the service performed by this railroad for these commuters, among others, is important or even essential to the short-haul passengers of Queens County or of the nearby parts of Nassau County, upon which the Court below relied so heavily, cannot be relevant to the larger issues of constitutional immunity. The States cannot determine their own immunity by penetrating into conventional business areas with declarations of essentiality. The operation of this interstate railroad does not fall within an area that the States have historically regarded as integral parts of their sovereign attributes. The LIRR, as described above, is "a railroad engaged in 'common carriage by rail in interstate commerce' ", as the courts below concluded, and its amenability to federal process is clearly established by the *California* v. *Taylor* line of cases within the four corners of the footnote 18 of *National League of Cities, supra*, at 854.

## II. THE OPERATIONS OF THE LIRR DO NOT MEET THE REQUIREMENTS, NECESSARY UNDER *NATIONAL LEAGUE OF CITIES v. USERY*, TO ESTABLISH A CLAIM OF TENTH AMENDMENT IMMUNITY.

In discounting the pertinence of *Taylor* and other railroad decisions of this Court discussed *supra*, the court below misconceived the expressed rationale of *National League of Cities*, expounded in repeated affirmations in that decision of the narrow limits upon the State's immunity under the Tenth Amendment.

These limits, which are expressed in slightly varying formulations throughout the *National League* opinion, *see, e.g.*, 426 U.S. at 846, 848-49, 850, 851, 852, 853, 853-54, 855, and notes 16, 17, and 18, at 851, 852, and 854, respectively, were recently summarized by this Court in *Hodel* v. *Virginia Surface Mining Association*, —— U.S. ——, 49 U.S.L.W. 4654, 4660:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States' *Id.*, at 854. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty'. *Id.*, at 845. And third, it must be apparent that the State's compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Id.*, at 852.

The instant claim meets none of these three requirements.[41]

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[41] The argument on the State-as-State requirement necessarily overlaps the argument on the two other requirements of *National League* as formulated in *Virginia Surface Mining*, *supra*. We therefore leave further discussion of the point to sections above dealing with those two requirements. We submit at the outset, however, unlike the Fair Labor Standards Amendments of 1974 (88 Stat. 55), specifically imposing wage-and-hour standards upon all state activities (except as to elected officials and their immediate appointees), the Railway Labor Act does not address itself to States as States. Like the other related federal labor laws (Statement of the Case, Part E, *supra* at 12, n.13), the Railway Labor Act address itself simply to railroads, with the intent to establish a uniform collective bargaining procedure for the protection of the national rail network from interruptions on any of its interlocking segments. "A strike in one State often paralyzes transportation in an entire section of the United States and, transportation labor dis-

1. Since the underlying premise of *National League* is "that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress", (426 U.S. at 845), we turn first to the second of the requirements as listed in *Virginia Surface Mining, supra*: that the federal regulations challenged under the Tenth Amendment "must address matters that are indisputably 'attributes of state sovereignty' ". 49 U.S.L.W. at 4659-60.

Obviously, "state sovereignty" does not encompass every activity in which a state chooses to engage. The Court made that clear in *National League*, in expressly confirming the continued authority of the earlier decisions denying sovereign immunity with respect to the state-owned railroads in *California* v. *Taylor*, 353 U.S. 553, *United States* v. *California*, 297 U.S. 175, and *Parden* v. *Terminal R. Co.*, 377 U.S. 184. 426 U.S. at 854-55, n. 18. What is determinative, the Court said in *National League*, is whether the particular activities claimed to be immune are "functions essential to separate and independent existence" of the State. 426 U.S. at 845; *see also Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 423 (concurring opinion, Chief Justice Burger).

The public operation of an interstate freight and passenger railroad, whether or not it is deemed to be important to the State or to the community, is not a function essential to the separate and independent existence of the State *qua* State. For most of the time since the founding of the Republic, the States have existed and have functioned as sovereigns without own-

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putes frequently result in simultaneous work stoppages in many States." *Railroad Trainmen* v. *Jacksonville Terminal*, 394 U.S. 369, 381. It matters not whether the railroad causing the interruption is privately owned or state owned. The result is the same.

ing or operating interstate railroads, and even in more recent times, few if any, apart from New York, find it appropriate to engage in railroading directly.[42] Nor did New York find it appropriate to designate the LIRR as a public benefit corporation, until February 8, 1980, following the filing of the complaint in this case.

A sovereign may, of course, enter into any commercial activity it chooses (absent constitutional interdiction), but its decision to do so does not make that activity a sovereign function immune from otherwise constitutional action of the federal government. In the field of the taxing power (long recognized as "the power to destory"),[43] this Court has denied immunity to a State-operated elevated railway (and therefore to its officers), holding that the provision of transportation services by the City of Boston "[was] distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State". *Helvering* v. *Powers*, 293 U.S. 214, 227. The Court summarized the point as follows:

> [T]he State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. *The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity . . . . The necessary*

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[42] In *California* v. *Taylor*, *supra* at 563-564 (1956), the Court noted: "We are told by the parties that there are today thirty public owned railroads, all of which are switching or terminal roads and only eleven of which are operated directly by the public." *See also Transit Fact Book*, American Public Transit Association (1979), at 75.

[43] *McCulloch* v. *Maryland*, 4 Wheat 316.

> *protection of the independence of the state government is not deemed to go so far.*

*Id.*, at 225, (citations omitted, emphasis added).

Even in the exercise of the state's constitutional police powers—the control of the local liquor traffic, if the state chooses to take over the sale of liquor instead of to regulate it, it subjects itself to the federal taxing power. *Ohio* v. *Helvering*, 292 U.S. 360; *South Carolina* v. *United States*, 199 U.S. 437. "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader . . . ." *Ohio* v. *Helvering*, at 369.

Were it otherwise, it would follow that any constitutional federal regulatory program responding to the national interest could be frustrated, within the boundaries of any given state, by the state's taking over the activity sought to be regulated. In the recent *Virginia Surface Mining* case, the Court upheld the constitutionality of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sec. 1201 *et seq.* (1976 Ed., Supp. III), in its application to privately owned coal mines (*supra*, 49 U.S.L.W. 4654). The Court cited the Congressional finding that many surface mining operations adversely affected interstate commerce " 'by counteracting governmental programs and efforts to conserve soil, water, and other natural resources' ". *Id.*, at 4657. Had the State of Virginia deemed it essential, in the local interest, to take over the surface coal mines, as the State of New York did the LIRR, it could hardly have been constitutionally empowered, as a sovereign owner, to engage in the very same activities even though they "counteract[ed] governmental programs and efforts to conserve [the Nation's] natural resources".[44] No theory of the federal-state relationship countenances an encroachment of this magnitude on a subject so clearly com-

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[44] *Cf. Jacksonville Terminal, supra*: " '[I]t would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme' ". 394 U.S. at 381.

mitted by the Constitution to the judgment of Congress in the national interest.

2. A further requirement of the Tenth Amendment immunity, as defined by *National League*, is a showing "that the State's compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'" *Virginia Surface Mining*, *supra*, 49 U.S.L.W. at 4660. The instant claim falls far short of meeting this requirement.

The operation of the LIRR is not an "integral operation" of the government of New York in any meaningful sense of the term. The LIRR operates today precisely as it did before the respondent MTA acquired ownership of its stock from the Pennsylvania Railroad in 1966. Its organization was not absorbed into the government structure, and decisions in connection with the provisions of service were not moved into levels of traditional statecraft. The railroad's officers and employees were excluded by state law from the category of "public officer or employee".[45] It was not until after the complaint was filed in this case that respondents "changed their posture completely by converting the railroad from a private stock corporation to a public benefit corporation whose employees would be facially subject to the Taylor Law" as public officers and employees (Pet. App. 31a).

At all times from the takeover to the present day, the LIRR has continued to operate in the same manner as any other Class I railroad and in the same manner as it has done throughout its history. In the words of the then Vice-President for Public Relations, James A. Schultz, "Absolutely nothing has changed . . . we just have a new owner and a new board of directors. We're under the

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[45] The laws of New York provide that "[n]otwithstanding any provisions of the civil service law, no officer or employee of a subsidiary corporation of the authority [the MTA], other than a public benefit subsidiary corporation, shall be a public officer or a public employee." N.Y. Public Authorities Law, sec. 1265, as amended by Laws of 1965, ch. 634.

Railway Labor Act, just as we've always been. The people do not become state employees, they remain railroad employees and retain all the benefits and drawbacks . . ." (App. E, *infra*, at 6a).

In sum, the changeover was simply a change in ownership; the railroad continued to play its accustomed role as an element of the national rail network in the transmission of interstate freight. To say that it became an "integral" part of government merely because the State has become its owner would extend the term "integral" to include public enterprises of all descriptions and would deprive the term, so frequently stressed in *National League*, of any limiting effect.

Likewise, the equally stressed term "area of traditional governmental functions" can have no application to the operation of railroads. The United States has had a long and consistent tradition of leaving the ownership and operation of railroads to the private sector, and limiting governmental intervention to grants, subsidies, and regulation.[46] That the State of New York chose in 1966 to depart in some degree from the historical and still pervasive practice, and to undertake the operation of an interstate railroad, hardly creates a tradition, any more than does the recent entry of several states into the business of running games of chance. Tradition cannot mean current practice, if substance is to be accorded to the term as used in *National League*. Nor in any event can we have one "tradition" in New York and another tradition in the remaining 49 states for the purpose of delimiting the scope of the federal authority to deal with labor disputes in the railroad industry on a nationwide basis.

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[46] J. Harr, *The Great Railway Crisis, an Administrative History of the United States Railway Association*, (National Academy of Public Administration, 1978) at 3-8.

Accordingly, this Court in *National League*, took pains to make clear that its prior decisions in the railroad cases continued to be authoritative (426 U.S. n. 18, at 854), stressing in particular that in *United States* v. *California*, 297 U.S. 175, the operation in question was that of a railroad engaged in "common carriage by rail in interstate commerce . . ." and was for that reason "not in an area that the States have regarded as integral parts of their governmental activities . . ." See also the concurring opinion of the Chief Justice in *Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 424, referring particularly to the public supply of electric power and to the public provision of railroad transportation, "It should be evident . . . that the running of a business enterprise is not an integral operation in the area of traditional government functions".

Even apart from the foregoing considerations, the LIRR's claim to *National League* immunity fails to meet the basic requirement that "compliance with the federal law would directly impair [the States'] ability 'to structure [their] integral operations . . .' ". *Virginia Surface Mining*, 49 U.S.L.W. at 4660; *National League of Cities*, 426 U.S. at 852.

The "ability to structure integral operations", which may not be impaired, must of course refer to something more specific than the ability to depart from federal standards. In *National League*, the ability found to be impaired was the ability of the States to make their own "policy choices . . . as to how they wish to structure pay scales in state employment". 426 U.S. at 848. Specifically, the Court noted, the States were forbidden by the federal law to pay less than rates prescribed by Congress or to adopt overtime schedules "on terms different from those which Congress has sought to impose". *Id.*, at 849. It was this Congressional attempt "to prescribe [the] minimum wages and maximum hours to be

paid by the States in their capacities as sovereign governments" which was held to constitute the impermissible impairment. *Id.*, at 852. By limiting States' choices in the setting of terms of employment to be offered for the services of their employees, the federal government, it was deemed, had sought to supplant the States *pro tanto* in the exercise of their sovereign functions.

The Railway Labor Act, in contrast, imposes no substantive standards limiting the railroads in the terms of employment they can offer. While the Act calls for collective bargaining, it "does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them" (*Texas & New Orleans R. Co.* v. *Railway and Steamship Clerks*, 281 U.S. 548, 571) and "does not undertake to compel agreement between the employer and [the] employees" (*Virginia Ry. Co.* v. *System Federation 40*, 300 U.S. 515, 548). It merely requires the parties to confer and negotiate, in recognition of the fact that "in the case of carriers, experience has shown that . . . when there was a willingness . . . to meet . . . representatives for a discussion of [the employees'] grievances, . . . strikes had been avoided." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45. The choice still remains with the railroad, private or public, to decide what terms it is prepared to grant. The "direct displacement" which is the essence of the unconstitutional intrusion found in *National League* does not occur.[47]

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[47] *Cf. Peel* v. *Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979) applying the Veteran's Reemployment Act, 32 U.S.C. 2021-6, to State employers, in which the Fifth Circuit rejected the argument "that the reemployment provisions of the Act 'directly displace the State's freedom to structure integral operations in areas of traditional functions' " (at 1083). *See also Pearce* v. *Wichita County*, 590 F.2d 128 (5th Cir. 1979), holding that Congress may constitutionally impose the provisions of the Equal Pay Act, 29 U.S.C. 206(d), on state employers. Under provisions of the EPA, the state would be required to raise the pay of women employ-

The policy of the federal Act deems the potential of ultimate strike or lockout to be indispensible to effective collective bargaining, and therefore to the long-term maintenance of industrial peace in the railroad sector. *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380-81. The policy of the state law, on the other hand, deems it necessary to provide an absolute prohibition of strikes in the public sector.[48] The court below reasoned that the freedom to strike under the federal policy may require "the State to pay higher wages in order to avert the devastating economic injury that a halt in the commuter transportation system would cause" and thereby impairs the State's ability to function as a sovereign (Pet. App. 15a).[49]

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ees to that of men doing equal work (section 206(d)(1)); but the Fifth Circuit deemed "[t]he ability to pay female employees less than those paid to male employees is not among the 'functions essential to [the] separate and independent existence' of the States'". 590 F.2d at 132.

[48] As already pointed out, the New York Taylor Law, like the California anti-strike law in *California* v. *Taylor*, *supra*, "reduces, but does not eliminate, the possibility of a work stoppage". 353 U.S. at 566. The record of man-days lost through work stoppages prohibited by the Taylor Law shows that the New York law is in this respect less effective than the Railway Labor Act. *See* note 28, *supra*, at 26.

[49] *But see Virginia Surface Mining*, *supra*, 49 U.S.L.W. 4661, n.33:

> The remaining justification asserted by the District Court for its Tenth Amendment ruling, one that appellees urge here, is that the steep-slope mining requirements will harm Virginia's economy and destroy the taxing power of some towns and counties in the Commonwealth. In this regard, the court may have been influenced by the discussion in *National League of Cities* about the likely effects of the challenged regulations on the finances of State and local governments. *National League of Cities* v. *Usery*, *supra*, at 846-847. But as the Court made clear, the determinative factor in that case was the nature of the federal action, not the ultimate economic impact on the States. *Id.*, at 847. Moreover, even if it is true that the Act's

But the difference between the federal and state policies with respect to the right to strike is not an unconstitutional intrusion into the area reserved exclusively to the States under the Tenth Amendment. It is a difference of judgment, in a field of overlapping jurisdiction, of no more Tenth Amendment significance than that considered in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 and in related federal preemption cases,[80] which under the Supremacy Clause must be resolved in favor of the federal legislation. *Virginia Surface Mining*, *supra*, 49 U.S.L.W. at 4660. "It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, [is] supported . . . by our long experience with industrial disputes, and the history of railroad labor relations . . .". *Virginia Ry. Co.* v. *System Federation 40*, *supra*, 300 U.S. at 553.

The choice made by Congress in the Railway Labor Act was to preserve the right of ultimate application of economic force as a catalyst and determinant of serious bargaining in order to achieve long term peace through-

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requirements will have a measurable impact on Virginia's economy, this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment.

[80] This Court has consistently held "that federal labor legislation, encompassing as it does all industries 'affecting commerce' ", overrides state public utility policies (*Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 391), designed to ensure, as in New York under its Taylor Law, an uninterrupted supply of " 'essential public utility service' . . . [covering] . . . water, heat, gas, electric power, public passenger transportation and communications." *Id.*, at 388. In its communication of this principle, the Court noted that "[t]he courts of appeal have uniformly held enterprises similar to and no more important to interstate commerce than the Milwaukee gas and transit companies before us in these cases subject to the provisions of the federal labor law." *Id.*, at 391 (footnote omitted). *A fortiori*, the state interest in maintaining service on LIRR whose "freight service supplies a critical link in the transportation of goods both to and from points throughout the continental United States and Canada" (Pet. App. 34a) cannot be held to override the strong national interest expressed in the Railway Labor Act.

out the national rail network. More specifically, "[t]he Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in *any* self-help." *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 381. This Court thought it:

> clear . . . that . . . [t]he disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a State would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in face of a strike.

*Id.*, at 380-81. Obviously, the incentive to reach agreement inherent in the potential of the adversary's economic force does not lose its importance when the owner of the railroad is a public body.

In any event, the choice was made by Congress to preserve the two-sided right of ultimate economic pressure. The contrary choice of a particular State, wise or not, must give way. "The determination of the permissible range of self-help 'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme' ". *Jacksonville Terminal*, *supra*, 394 U.S. at 381. As the Court in *Jacksonville* emphasized, a strike in one state affects the movement of freight from and to other states, and railroad disputes "typically present problems of national magnitude" and often "result in simultaneous work stoppages in many states". *Id.* " 'The needs of the subject matter manifestly call for uniformity'." *Id.*, at 381 (citations omitted).[51]

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[51] Conceding *arguendo* that each of the three requirements of *National League of Cities* has been satisfied in this case, nonetheless, as *Virginia Surface Mining*, *supra*, at 44, n.48, cautions, it does not follow that respondents' Tenth Amendment challenge to

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.

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September 1981

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the Railway Labor Act should succeed. Here, the national interest in the uninterrupted operation of the national rail network in its entirety, expressed in the Railway Labor Act and in the related railroad laws, should, on balance, predominate against the local interest of a State in providing rail passenger service to commuters such as those on Long Island. The nature of the federal interest in ensuring the uninterrupted movement of interstate rail traffic through a gateway as significant as New York and indeed throughout the entire rail system is so well established and of such significance to all parts of the national economy that it must be held to prevail over the parochial needs of a group of commuters, in a segment like Long Island, to whom other modes of transportation must be available. However, since respondents have clearly failed to satisfy any of the criteria without which its Tenth Amendment challenge cannot succeed, further consideration of this point does not appear to be required.

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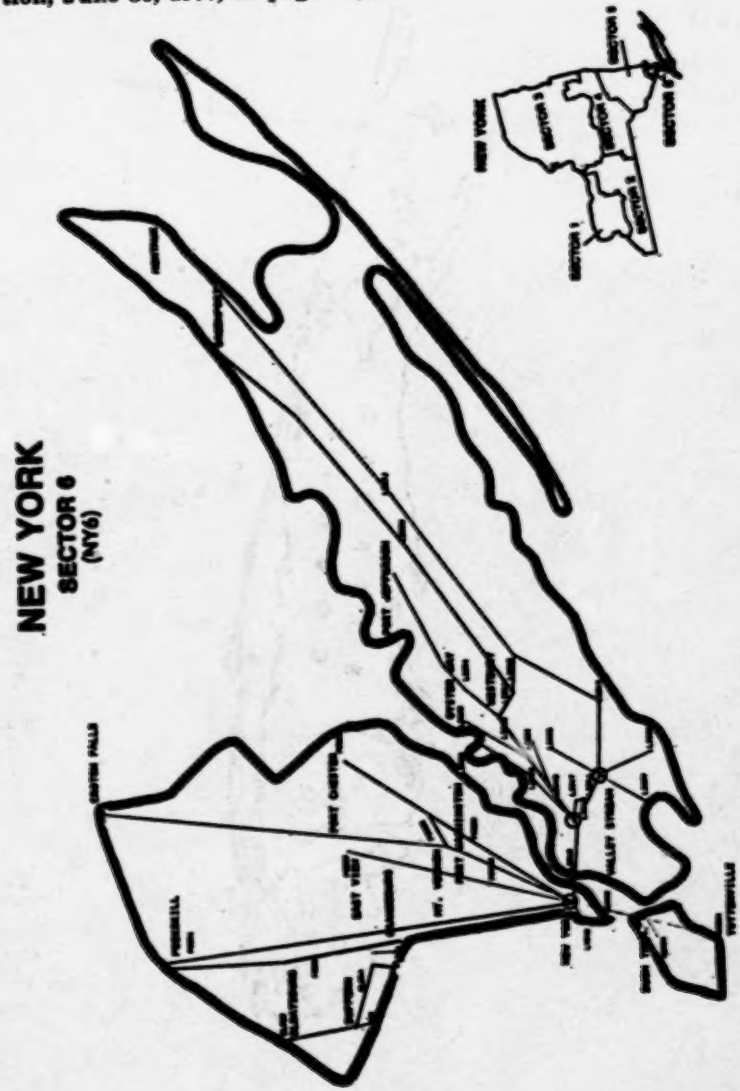
## APPENDIX A

### Counties of Long Island

## APPENDIX B

**Rail Sector Maps—*Final Standards, Classification, and Designation of Lines of Class I Railroads in the United States,* Vol. II (publication of the U.S. Department of Transportation, June 30, 1977, at page 88).**



## APPENDIX C

### Section 10, Railway Labor Act, as Amended, 45 U.S.C. 160

### EMERGENCY BOARD

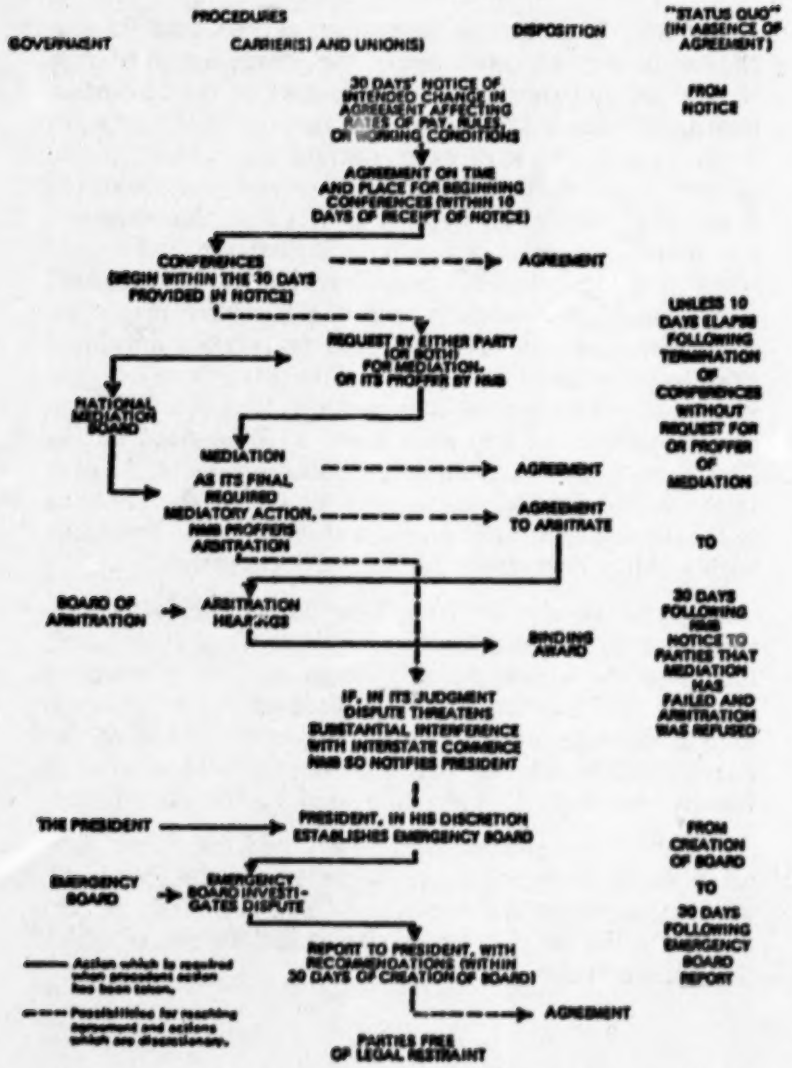
SEC. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however*, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

# APPENDIX D

## Railway Collective Bargaining Procedures and "Status Quo" Periods Under the Railway Labor Act



## APPENDIX E

**New York Times, January 21, 1966, p. 16**

# STATE TAKES OVER THE L.I. RAIL ROAD

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**Finishes Paying the Pennsy—Re-elects All Officers**

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By DOUGLAS E. KNEELAND

New York State went into the railroad business yesterday.

The recently created five-man Metropolitan Commuter Transportation Authority took over the Long Island Rail Road as Dr. William J. Ronan, the authority chairman handed a check for $55 million to the road's outgoing board of directors to complete the purchase. On Dec. 22 the state had made a down payment of $10 million on the $65 million sale price.

Members of the authority immediately assumed their roles as directors and re-elected Thomas M. Goodfellow, the Long Island's president, and all other officers.

### Memorandum On Way

However, the $55 million check was placed in escrow until written approval of some aspects of the transfer is received from the Interstate Commerce Commission.

A spokesman for the commission in Washington said the authority and the railroad had been notified that a formal "memorandum of understanding" was on the way. The commission's approval was needed for a new lease permitting the Long Island to continue to use some

Pennsylvania Railroad tracks and for the sale of the entire yard and trackage of the Long Island's Bay Ridge Division and part of the Evergreen Division to the Pennsylvania.

In yesterday's transaction at the railroad's Jamaica offices, the 131-year-old Long Island made the switch to an untried track as smoothly as an express rolling over a punched-out commutation ticket.

For the line's 260,000 daily riders and more than 6,500 employees, there was not a jolt.

"Absolutely nothing has changed," said James A. Schultz, vice president for public relations. "People are pounding the same typewriters and pulling the same switches as they always have."

"We just have a new owner and a new board of directors. We're under the Railway Labor Act, just as we've always been. The people do not become state employes, they remain railroad employes and retain all the benefits and drawbacks of that."

Noting that the authority was considering some modernization of equipment and operating changes, he added that it would take time to accomplish these because "it's not like buying groceries off the shelf—it takes planning."

Surveys Are Awaited

A spokesman for the authority said detailed engineering studies were being awaited on several projects under consideration. These include, he said, the elimination of the Jamaica bottleneck, electrifying the railroad to more distant points, buying new equipment and improving the signal system.

The spokesman said the authority planned to use part of the $200-million bond issue authorized under the enabling act passed last year by the Legislature, to buy

about 500 multi-unit, self-propelled commuter cars so that some of the line's old rolling stock could be scrapped.

He added that the authority was also still considering the possibility of running trains directly through Brooklyn to Manhattan over BMT subway tracks, and of opening a new terminal on the East Side, probably at Park Avenue and 34th Street.

As control of the Long Island passed from the Pennsylvania Railroad to the state, jurisdiction over fare increases was transferred from the Public Service Commission to the Metropolitan Commuter Transportation Authority.

Dr. Ronan reiterated yesterday that the authority planned no fare increases. He explained that a public hearing would have to be held before any were put into effect.

Dr. Ronan also said he would continue as Governor Rockefeller's secretary at an annual salary of $29,875, and would not assume the $45,000 salary to which the chairman of the authority is entitled. "All I need is for somebody to fire me as a secretary," he said with a smile.

In addition to Dr. Ronan, the members of the authority are William A. Shea, William L. Butcher, Bruce A. Gimbel and Eben Payne.

## APPENDIX F

**Amendments to the Railway Labor Act,
Pursuant to P.L. 97-35 (August 13, 1981),
The Omnibus Budget Reconciliation Act of 1981, Title XI**

### *DEFINITIONS*

*Sec. 1135. (a) As used in this subtitle, unless the context otherwise requires, the term:*

* * * *

*(4) "Commuter service" means short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations.*

* * * *

### *AMENDMENT TO THE RAILWAY LABOR ACT*

*Sec. 1157. The Railway Labor Act is amended by inserting immediately after section 9 the following new section:*

### *"SPECIAL PROCEDURE FOR COMMUTER SERVICE*

*"Sec. 9A. (a) The provisions of this section shall apply to any dispute subject to this Act between a publicly funded and publicly operated carrier providing rail commuter service (including the Amtrak Commuter Services Corporation) and its employees.*

*"(b) If a dispute between the parties described in subsection (a) is not adjusted under the foregoing provisions of this Act and the President does not, under section 10 of this Act, create an emergency board to investigate and report on such dispute, then any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is*

*operated may request the President to establish such an emergency board.*

*"(c)(1) Upon the request of a party or a Governor under subsection (b), the President shall create an emergency board to investigate and report on the dispute in accordance with section 10 of this Act. For purposes of this subsection, the period during which no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose shall be 120 days from the date of the creation of such emergency board.*

*"(2) If the President, in his discretion, creates a board to investigate and report on a dispute between the parties described in subsection (a), the provisions of this section shall apply to the same extent as if such board had been created pursuant to paragraph (1) of this subsection.*

*"(d) Within 60 days after the creation of an emergency board under this section, if there has been no settlement between the parties, the National Mediation Board shall conduct a public hearing on the dispute at which each party shall appear and provide testimony setting forth the reasons it has not accepted the recommendations of the emergency board for settlement of the dispute.*

*"(e) If no settlement in the dispute is reached at the end of the 120-day period beginning on the date of the creation of the emergency board, any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish another emergency board, in which case the President shall establish such emergency board.*

*"(f) Within 30 days after creation of a board under subsection (e), the parties to the dispute shall submit to the board final offers for settlement of the dispute.*

*"(g) Within 30 days after the submission of final offers under subsection (f), the emergency board shall submit a report to the President setting forth its selection of the most reasonable offer.*

*"(h) From the time a request to establish a board is made under subsection (e) until 60 days after such board makes its report under subsection (g), no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose.*

*"(i) If the emergency board selects the final offer submitted by the carrier and, after the expiration of the 60-day period described in subsection (h), the employees of such carrier engage in any work stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act.*

*"(j) If the emergency board selects the final offer submitted by the employees and, after the expiration of the 60-day period described in subsection (h), the carrier refuses to accept the final offer submitted by the employees and the employees of such carrier engage in any work stoppage arising out of the dispute, the carrier shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage.".*

No. 80-1925

Office - Supreme Court, U.S.
FILED
OCT 30 1980
ALEXANDER L. STEVAS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION,

*Petitioner,*

v.

LONG ISLAND RAILROAD COMPANY
and
METROPOLITAN TRANSPORTATION AUTHORITY,

*Respondents.*

On Writ of *Certiorari*
*to the*
United States Court of Appeals
for the Second Circuit

## BRIEF FOR THE RESPONDENTS

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## QUESTION PRESENTED

Does the immunity for State sovereignty reaffirmed in *National League of Cities v. Usery* preclude application of the Railway Labor Act to structure the determination of employment conditions by a State-owned and operated commuter railroad?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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UNITED TRANSPORTATION UNION,

*Petitioner,*

v.

LONG ISLAND RAILROAD COMPANY

and

METROPOLITAN TRANSPORTATION AUTHORITY,

*Respondents.*

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**On Writ of *Certiorari***

**to the**

**United States Court of Appeals**
**for the Second Circuit**

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## BRIEF FOR THE RESPONDENTS

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### STATEMENT

This case calls upon the Court to decide whether Congress may impose its decisions regarding the structure of labor relations in the public sector upon a State transit agency which provides local commuter rail service to a region dependent on public transportation. Respondent Metropolitan Trans-

portation Authority (the "MTA"), an agency of the State of New York, owns and operates the Long Island Railroad (the "LIRR"), which transports 260,000 riders every day along rail lines connecting Nassau and Suffolk Counties on Long Island with terminals in New York City. The MTA also owns and operates the New York bus and subway systems, as well as various bridges and tunnels which comprise part of the commuter transportation network for the metropolitan region.[1]

The MTA and its affiliated agencies have a work force of some 53,000 employees. But for the 6,800 employees of the LIRR, all the MTA's workers are covered by the New York Public Employees' Fair Employment Act (the "Taylor Law"), N.Y. Civ. Serv. Law §§ 200-214 (McKinney 1973 & Supp. 1980-81),[2] pursuant to which they are organized into various bargaining units—including one unit of more than 33,000 bus and subway workers—that engage in collective negotiations with the MTA. The relationship between these 46,000-plus employees and the Authority is governed by the impasse procedures set forth in the Taylor Law, which expressly prohibits all strikes by public employees and subjects both labor

[1] The MTA carries out these functions in part through its statutory status, N.Y. Pub. Auth. Law, § 1264 (McKinney 1970), as the ex officio board of the New York City Transit Authority (NYCTA), §§ 1200-21; the Triborough Bridge and Transit Authority, §§ 550-71; and the Manhattan and Bronx Surface Transit Operating Authority, a subsidiary of NYCTA, § 1203-a. Pursuant to its power to form subsidiaries, the MTA controls the LIRR, the Staten Island Rapid Transit Operating Authority, the Metropolitan Suburban Bus Authority, the Stewart Airport Land Authority, and the Metropolitan Airport Authority. § 1266(5).

[2] The Staten Island Rapid Transit Operating Authority (SIRTOA), which employs 280 workers, may also be subject to the Railway Labor Act. *See Brotherhood of Locomotive Engineers* v. *Staten Island Rapid Transit Operating Auth.*, Finance Dkt. No. 29011 (ICC Nov. 8, 1979).

organizations and individual employees to a variety of penalties in the event of a violation of this no-strike rule.[3]

By contrast, Congress has imposed on the LIRR and its employees the very different procedures of the Railway Labor Act (the "RLA"), 45 U.S.C. §§ 151-163 (1976). Solely because the LIRR carries some freight cars which it interchanges in Queens with interstate freight lines—a service accounting for only 4% of the railroad's revenue[4]—the LIRR is a "carrier" subject to the Interstate Commerce Act, 49 U.S.C. § 10501(a)(Supp. III 1979), and is therefore subject to the RLA. Under the procedures of the RLA, the LIRR's employees have organized into 23 bargaining units represented by 17 separate labor organizations.[5] And unlike virtually all other

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[3] The Taylor Law provides that labor organizations involved in a strike will lose their right to dues check-off privileges for a period determined by the State Public Employment Relations Board, and that individual striking employees will be penalized two days' pay for each day of a strike. N.Y. Civ. Serv. Law § 210 (McKinney 1973 & Supp. 1980-1981.) In addition, the State courts are authorized to impose contempt sanctions for actions violating injunctive orders against a strike. In the 1980 New York City bus and subway strike, each of these penalties was imposed. The striking unions lost dues check-off rights for eighteen months. *In re TWU, Local 100,* 14 PERB ¶3074 (1981).

[4] Between 1966 and 1979 LIRR passenger operations increased from 73.65 million passengers to 77.38 million. But freight activity declined dramatically, from 113,965 cars or 11.8% of all revenue in 1966 to only 40,936 cars or 4% of all revenue in 1979. Jt. App. 39, 41, 49. In contrast to the $12.1 million freight revenue reported by MTA, Jt. App. 49, Petitioner's Brief (p. 11) claims that freight operations generated $19 million in 1979. The discrepancy is attributable to Petitioner's inclusion of a "freight surcharge" imposed in 1973 to offset a Congressional increase in railroad retirement taxes on passenger operations. Jt. App. 49. On August 7, 1981, the Interstate Commerce Commission found the surcharge to be illegal and ordered the LIRR to make refunds retroactive to 1973. ICC *Ex parte* No. 299 (Sub. No. 1) and No. 36874 (1981), *appeals docketed,* No. 81-4139 (2nd Cir. Aug. 7, 1981) and No. 81-4306 (5th Cir. Aug. 7, 1981). On the basis of freight car miles, freight service accounted for only 2.1% of passenger activity. Jt. App. 35. Moreover, the LIRR is exclusively a terminal line; 90% of its freight traffic terminates in Nassau or Suffolk Counties. By any measurement, the LIRR is overwhelmingly a railroad engaged in intrastate commuter transit service.

[5] One bargaining unit has only five employees, while another represents twelve workers. Jt. App. 52.

MTA employees, the LIRR unions are permitted to bargain over pension benefits, a subject withdrawn by statute from collective negotiations in the public sector for New York State employees. 1973 N.Y. Laws, ch. 382, § 6. Also unlike all other MTA employees, they do have the right to strike, after exhausting the impasse procedures specified by the Federal law. Just this year, Congress amended the federal act, thus making explicit its imposition of the RLA's procedures on State transportation agencies by adopting special rules for public commuter railroads, including the MTA.[6]

Like the MTA's bus and subway lines, the LIRR began as a privately-owned, profit-making enterprise, and was transformed into a public service by force of economic circumstance. In 1966 the State of New York acquired the LIRR stock because its private owner, the Pennsylvania Railroad, could no longer afford to operate it and absorb the rapidly expanding losses from the LIRR passenger service.[7] The State assumed the

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[6] In the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1157, Congress added a new Section 9A to the RLA, specifically applicable to state agencies providing commuter rail services. Under these amendments, the President is obliged to appoint two successive Emergency Boards upon request by the Governor, the commuter rail authority or the union involved in a continuing labor dispute which the National Mediation Board procedures have failed to resolve. Section 9A(b), (c)(1), (e). Each appointment of a Board triggers a 120-day "cooling off" period. Sec. 9A(c), (e)-(h). The Second Board is obliged to select among "final offers" of settlement from each party. Section 9A(f) and (g). The statute also seeks to induce settlement by providing that the party refusing to accede to the Board's final offer selection is precluded from receiving unemployment insurance benefits in the case of employees, or mutual assistance payments in the case of the authority, in the event a strike follows the expiration of all cooling-off periods. Sec. 9A(i), (j). These procedures may delay exercise of the right to strike by up to 240 days, but since the LIRR is obliged to bargain locally with each of its twenty-three units, Jt. App. 52, negotiations are virtually a year-round activity. It is likely that the unions will be prepared to wait out the new emergency procedures, if necessary, to make use of the legal right to strike in the RLA.

[7] The Long Island Railroad was placed under the jurisdiction of the MTA in 1968 and continued as a stock corporation until 1980, when the Authority transformed it into a public benefit corporation. Under State law, this action made railroad personnel State employees subject to the Taylor Law. N.Y. Pub. Auth. Law § 1265(9)(a) (McKinney 1970).

operation of the railroad in order to prevent its certain abandonment, and thus to continue a service vital to the economic and social well-being of the region.[8] N.Y. Pub. Auth. Law § 1260 (McKinney, 1970). Across the nation, transit has become increasingly a responsibility of State and local government. J.P. Womack & A. Altshuler, *An Examination of the Transit Funding Process at the Local Level* (May, 1979).

Petitioner United Transportation Union (the "UTU"), one of the 17 labor organizations representing LIRR employees, brought this action in the United States District Court for the Eastern District of New York on December 7, 1979, seeking a judgment declaring that the RLA governs the Union's relationship with the Long Island Railroad. Having exhausted the RLA's procedures in their pending labor dispute, the UTU struck the railroad the next day. The strike ended only after the National Mediation Board certified that Presidential intervention was warranted and the President of the United States convened an Emergency Board, 45 U.S.C. § 160 (1976), triggering a 60-day "cooling-off" period. Pet. App. 4a, 30a-31a.

Petitioner UTU thereafter moved for summary judgment. Rejecting the MTA's argument that under this Court's decision in *National League of Cities v. Usery,* 426 U.S. 833 (1976), application of the RLA to the LIRR unconstitutionally interfered with New York's freedom to structure labor relationships between its agencies and State employees, the district court concluded that the RLA did apply, preempting application of the State's Taylor law. To preserve the *status quo,* however, the

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[8] In 1970 the former chairman of the MTA testified before the United States Senate that "if the Long Island Railroad went out of existence tomorrow, it would take a minimum number of 26 lanes of expressway from Long Island in one direction and 26 coming out of the City to handle the traffic currently handled by the Long Island Railroad." *Effect of Railroad Mergers on Commuter Transportation: Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking & Currency,* 90th Cong., 2d Sess. 1138 (1968). He added that to provide the necessary additional parking for the commuters served by this railroad would require setting aside ten blocks in Central Manhattan. *Id.*

court enjoined petitioner from resuming its strike against the railroad pending the MTA's appeal. Pet. App. 48a.[9]

The Court of Appeals for the Second Circuit reversed, the panel unanimously concluding that the RLA as applied to the LIRR violates the immunity constitutionally assured to State governments against Federal regulations of commerce which infringe the States' protected autonomy interests. Finding that public commuter transit services qualify for this immunity and that the freedom to structure procedures for employee relations is a basic attribute of sovereignty, the Second Circuit held that the "RLA impairs the State's ability to structure employer-employee relationships in its role as sole provider of an essential public service," and is therefore invalid as applied to the LIRR under the principle articulated in *National League of Cities.*

In explaining its decision, the court of appeals distinguished *United States v. California,* 297 U.S. 175 (1936), and *California v. Taylor,* 353 U.S. 553 (1957), which sustained the application of the Federal Safety Appliance Act and the RLA, respectively, to the California State Belt Railroad. The state-owned rail line involved in those cases "was solely a freight service, the proceeds from which were used for harbor improvements." Pet. App. 16a-17a, *citing* 297 U.S. at 183. By contrast, the court found that the passenger transit service which forms the overwhelming proportion of the LIRR's business "is now of necessity provided almost exclusively by state and local governments, the service is essential to the public and inures to its benefit much more directly . . . [as a result] of the community wide need . . . . [and] a process of economic elimination of private suppliers." Pet. App. 17a-18a.

The court of appeals also rejected Petitioner's contention that the Federal interest in application of the RLA to the LIRR is so "demonstrably greater" as to "override a state's claim to immunity even in an area found to involve integral governmental functions." Pet. App. 15a. See *National League of Cities,* 426 U.S. at 856 (Blackmun, J., concurring); *Hodel v.*

[9] The negotiation between MTA and UTU was settled by an agreement on April 11, 1980. Pet. App. 6a, n.6.

*Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981). "The State and its municipalities," said the court, "have a vital predominant interest in the continuous operation of its commuter passenger service." Pet. App. 24a. Like virtually every other State, New York had pursued this interest by tailoring labor relations for public employees to the special prerequisites of the public sector, including the almost universal prohibition on strikes by public workers.[10]

## SUMMARY OF ARGUMENT

Uninterrupted transit service is the lifeblood of the New York metropolitan region. The transportation services supplied by New York's Metropolitan Transportation Authority carry six million passengers a day, or one of every three persons who use public transit in the entire nation. The Long Island Railroad is a crucial link in the network of commuter transit facilities that the MTA provides.

New York State is obliged to supply the public transit upon which New Yorkers depend because it has proved economically impossible for private entrepreneurs to furnish this essential service. The State's responsibility to safeguard its residents' economic and social well-being has thus made the provision of transit services, including the LIRR, fundamental to the fulfillment of the State's sovereign function. In New York, public dependence on commuter transit supplied by the State is so complete and constant that, more than any other function, transit dominates the political process and serves as the focal point for the individual's contact with government. From both perspectives, this commuter transit service bears no kinship to the freight activity of the State-owned railroads subjected to Federal regulation in *United States v. California*, 297 U.S. 175 (1936), *California v. Taylor*, 353 U.S. 553 (1957), or *Parden v. Terminal R. Co.* 377 U.S. 184 (1964).

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[10] *See Summary of State Labor Laws*, 1 [Ref. File] Gov't Empl. Rep. (BNA) 51:501-30 (April 20, 1981); Doherty, *Public Policy and the Right to Strike* in Public Employment Relations Services, Portrait of a Process—Collective Negotiations in Public Employment 251-268 (1979).

In 1981, no attribute of sovereignty is as essential to the separate existence of a sovereign State as the freedom to structure, to design and to implement procedures for resolving disputes between the State and its employees. Both the State's function as provider of basic public services and the State's role as regulator of private activity are exercised through its employees. Given the fundamental dependence of the public on commuter transit, Federal regulations compelling a State transit agency to permit strikes by transit employees, to follow Federal procedures for defining bargaining units, for administering labor contracts, for resolving impasses in labor negotiations, for determining the scope of bargaining and for responding to work stoppages displace the kind of sovereign decision-making central to the concept of State autonomy.

In *National League of Cities*, this Court recognized that a State's sovereign interests do not always find adequate protection in the political processes of the Congress. Notwithstanding the considerable influence afforded to the States by virtue of their role in the selection and composition of the National legislature, the Court has reasserted its responsibility to check congressional actions which intrude too severely on the States' freedom to choose "how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855.

New York's choices in structuring employer-employee relationships with the portion of its work force providing commuter transit service in New York City surely rank among its most basic policy decisions. Weighed against the State's concern that its political process not be distorted by labor relations procedures more suited to privately-owned transportation companies, the Federal interest in ensuring these employees the right to strike, the right to bargain over pensions, or the right to craft-based units for collective bargaining, pales to the vanishing point. The State is therefore constitutionally entitled to a judgment confirming its immunity from supervening Federal commands when it exercises its freedom to devise for itself a method by which it may accommodate its

employees' interests and the requirements of all its citizens for the basic public service of commuter transportation. Because it transgresses the immunity for State sovereign functions affirmed in *National League of Cities*, the application of the RLA to the LIRR exceeds the bounds of federal power and violates the Tenth Amendment to the Constitution.[11]

## ARGUMENT

### I. APPLICATION OF THE RAILWAY LABOR ACT TO THE LONG ISLAND RAILROAD VIOLATES NEW YORK STATE'S SOVEREIGNTY BY DIRECTLY DISPLACING THE STATE'S FREEDOM TO STRUCTURE ITS LABOR RELATIONS WITH ITS EMPLOYEES.

In this case the Court squarely confronts for the first time the meaning of the rule announced in *National League of Cities*. In its resolution of the present dispute, the Court must decide whether *National League of Cities* is a precedent which reflects increased awareness of the States' constitutional responsibilities in our Federal system, or whether it is an aberration to be read as narrowly as possible and, ultimately, to become a derelict of constitutional law.

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[11] While the Tenth Amendment is frequently cited as the basis for the *National League of Cities* decision, the constitutional protection of State sovereignty is grounded in the States' independent role in the Federal system, which the framers had no choice but to accept. The States' autonomy was the "means and the price" of forming the nation. *See* Wechsler, *Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). This sovereign interest constrains the exercise of Federal power otherwise granted by the commerce clause. The Court's opinion in *National League of Cities* concluded that the amendments challenged there were "not within the authority granted Congress by Art. I § 8 cl. 3." 426 U.S. at 852. The Tenth Amendment, which expresses the principle that powers not delegated to the nation are reserved to the States and to the people, thus is used as shorthand for the immunity built into the structure of government established by the Constitution.

This Court held in *National League of Cities* that States are immune from Federal regulations of commerce which "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. This zone of immunity is required, said the Court, to protect the States' separate and independent existence in the face of national regulations which "force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855. In the specific dispute there at issue, congressional actions applying the minimum wage and maximum hour regulations of the Fair Labor Standards Act to public employers, Pub. L. No. 93-259, 88 Stat. 55, were held unconstitutional because those regulations, while admittedly within the reach of the national commerce power, "directly supplant[ed] the considered policy choices of the State's elected officials and administrators as to how they wish to structure pay scales in state employment," 426 U.S. at 848, a determination the Court recognized as an "undoubted attribute of state sovereignty." 426 *Id.* at 845. If the principle of *National League of Cities* is to survive as a meaningful precedent, the immunity it secures must surely reach a State's design of the structure of its employment relations with thousands of employees.

Last term, in *Hodel v. Virginia Mining & Reclamation* Association, No. 79-1538, slip op. at 21 (June 15, 1981) the Court elaborated the *National League of Cities* standard for defining the scope of a State's immunity from Federal regulation.

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States'. [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly

> impair their ability 'to structure integral operations in areas of traditional functions'. *Id.* at 852

In addition, the Court noted that there may be circumstances in which "the nature of the federal interest advanced may be such that it justifies State submission," notwithstanding the fact that these requirements are met. *Hodel v. Virginia Surface Mining Reclamation Association,* slip op. at 21 n.29.[12]

Petitioner UTU and *amicus* United States attach particular emphasis to the phrase, "traditional governmental functions," in the plurality opinion in *National League of Cities*—and to the Court's note that the holding, though not the language, of *United States v. California* survives, because the activity of common carriage by rail in interstate commerce is not such a function, 426 U.S. at 954 n.18. We submit that an informed reading of *National League of Cities* demonstrates that State rail transit facilities like the LIRR fall within the scope of the phrase used by the Court. Properly construed, this phrase means that immunity must turn on the fundamental dependence of the public on the service involved—not on a determination of whether State and local government or private investors supplied it during the nineteenth century.

In *National League of Cities,* this Court listed "fire prevention, police protection, sanitation, public health, and parks and recreation", 426 U.S. at 851, as well as "schools and hospitals", *id.* at 855, as examples of services the States have traditionally afforded. Yet a review of State or local activity in the first century of the nation's history reveals why immunity cannot be defined by a time-bound test. In New York City, for example, universal access to free public schools did not exist before 1842. Fire protection was "traditionally" (in the temporal sense) supplied in large part by insurance companies. The Legislature did not provide for a paid "Metropolitan Fire Department" until 1865. Until then, volunteer companies

[12] The *Hodel* case itself has no relevance here, since the Congressional regulation at issue there did not regulate the States as States, but rather preempted state regulation of a particular area of private economic activity.

competed to respond to fires, inspired by bonus payments offered by the insurance companies. Voluntary philanthropic and religious groups had primary responsibility for the development of hospitals and the provision of health care and other services to the poor. Private carters collected garbage until 1895, and the City had no day-time police service until 1844, when the night watch was abolished. See J. Wilson, ed., Memorial History of the City of New-York, Vol. III 385-88, 529-30 (1893); W. Bonner, New York The World's Metropolis 215-20, 233-34 (1924); D. Ravitch, The Great School War (1975). G. Sheldon, The Story of the Volunteer Fire Department of the City of New York (1882). The States' immunity from national control assured by the federalism principle in the Constitution must, therefore, turn on a functional evaluation of the public's need for the particular service involved and its dependence upon State or local government to provide it. [13]

Respondents demonstrate in greater detail in subsections (A)—(C) below how application of the specific tests articulated in *National League of Cities* and restated in *Hodel* compels invalidation of the RLA as applied to the LIRR. This result is even more apparent, however, if one considers the animating principles underlying the Court's recognition in *National League of Cities* of the need for judicial protection of the State's freedom to exercise the power of choice in public decision-making that characterizes and defines separate sovereignty.

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[13] In the broadest sense, of course, transportation services enabling people to travel from home to work surely rank among the oldest and most pervasive responsibilities of government. Since the nation was founded, governments have built and maintained streets, roads, canals and other arteries for the transport of people. In every community, the public agenda has included decisions concerning the allocation of tax resources among different modes of transportation. Today, the forms of public transit service vary from one part of the country to another, but each State and local government is involved in providing transportation facilities to its citizens. The Council of State Governments, The Book of the States 1980-1981 at 383-401 (1980).

**The Values of State Sovereignty**

In the adjudication of controversies involving the distribution of political authority between the nation and the States, the scope of constitutional protection cannot turn on verbal formulas; rather, it must rest upon enduring principles which define the ambit and limits of political power secured to each level of government in a Federal system. As Justice Cardozo said, dissenting in *Carter v. Carter Coal Co.*, "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective." 298 U.S. 238, 327 (1936). Both the reality of the State's zone of immunity from Federal regulation and the scope of the protection which the Constitution requires inhere in the goals which compel the immunity and the values which have commended it to this Court. From this perspective, petitioner's claim must fail primarily because it does not account for the economic reality and social urgency which place transit services—including bus, subway and commuter rail service—at the very top of the list of essential public services provided to the people of New York.

The rule of *National League of Cities* rests upon the recognition that there exist identifiable values of State sovereignty in the constitutional system; that these values may be jeopardized by the application of Federal commerce regulations to vital State activities; and that the Congress is not always sufficiently sensitive to the special role of State autonomy in the constitutional plan. Each of these points bears on the application of the Railway Labor Act to the LIRR, and each compels the conclusion that this commerce regulation cannot be applied to New York's commuter railroad.

The sovereignty of the separate States was not just a political axiom at the Constitutional Convention, but a precept firmly rooted in the theory of government which underlies the structure established by the Constitution. *See* The Federalist No. 46 (J. Madison); Diamond, *The Federalist on Federalism: 'Neither a National Nor a Federal Constitution, But A Composition of Both'*, 86 Yale L.J. 1273 (1977). That theory teaches that the existence and independence of the several

states serves to promote diversity, to increase opportunities for participation in the process of self-government, to foster experimentation in the design and delivery of public services, and ultimately, to enhance individual liberty. *See* B. Bailyn, The Ideological Origins of the American Revolution 172-75 (1967); on the advantages of local government to the futherance of these goals, *see* J. S. Mill, Utilitarianism, Liberty, and Representative Government, 225-29 (Everyman's ed. 1950). What is most pertinent to the issue now before the Court is the equally long-standing recognition that the essence of sovereignty is the power to choose: to design and structure those services most needed by the people. The State Capitol or the legislative chamber may be so much the symbolic representations of sovereign government that a State's separate and independent existence is threatened by Federal actions dictating their location, *see Coyle v. Oklahoma,* 221 U. S. 559 (1911), but it is in fact the freedom to decide that lies at the core of sovereign government. Sovereignty is defined by the power to determine which services are most needed by the people, which revenue sources most useful, which claims to these revenues most commanding; and by the freedom to prefer one service over another, using governmental powers to effectuate that preference. Throughout the nation's history, each State has made these choices through executive, legislative and judicial officers, and implemented them through those persons whom it hires to deliver services and administer the law. Today, more than 12.7 million persons work for State and local governments, including 920,000 in the State of New York. The Council of State Governments, The Book of The States 1980-1981 at 271 (1980).

In contemporary terms, sovereignty depends upon the power to set the level of taxes, to determine the types of levies imposed on state residents, and to allocate these receipts in response to public need for education, safety, health, environmental protection, transportation or other services. Basic to these allocative determinations is the question of the structure of employee relations between the State and its workers. In a State like New York—with annual State and

local government general revenue of $35.2 billion, The Book of the States at 302—the design of labor procedures is a key component of government decision-making. Indeed, whether to recognize a right to collective bargaining for public workers, how to define units for bargaining, how to resolve impasses, and what subjects may be raised in negotiation or determined through arbitration of grievances, have been matters of public debate and electoral controversy for many years in every State in the Union. Against this backdrop, the Congress has interposed a Federal regulation which commands New York to apply to a transit service essentially indistinguishable from other State transportation facilities procedures designed for and best suited to privately-owned railroads or airlines.

This Court established in *National League of Cities* that when Congress applies a commerce regulation not to the "shifting economic arrangements" of the private sector of the economy, *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring), but to the States as States, it invades the process of political choice that is the essence of State sovereignty preserved by the Constitution. The issue is not whether the congressional objective is unsound, or whether the goal does or does not serve the national interest. Nor is it pertinent to inquire whether the Railway Labor Act or the Taylor Law represents a better judgment of public policy, or, for that matter, whether the judgment made by Congress is similar or dissimilar to that made by New York.[14] Rather, the central point is that in such critical areas of government services, the State needs the freedom to make its own choices. It needs the opportunity to make these decisions unwisely, even, limited only by the specific restrictions of the Constitution as they apply to State actions. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Perhaps most important in the *National League of Cities* decision is this Court's recognition that Congress may no longer

[14] *Cf.* Brief of United States at 31-34. On this policy judgment, of course, elected officials, union leaders, and academic experts vigorously differ. *See, e.g.*, H. Wellington & R. Winter, The Unions and the Cities (1972); Public Employment Relations Services, Portrait of a Process—Collective Negotiations in Public Employment (1979); B. Aaron, J. Grodin and J. Stern (eds.), Public Sector Bargaining (1979).

afford adequate protection to the States' autonomy interests. Changes, both structural and political, in our system of government have combined to reduce the influence of the States as States in the national legislature. The State's control over congressional districts and voter qualifications has been limited by legislation, Constitutional Amendment and decisions of this Court. Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1976); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315 (codified at 42 U.S.C. §§ 1973b, 1973, 1973 aa to 1973 bb-4 (1976) (eighteen-year-old vote); *Oregon v. Mitchell,* 400 U.S. 112 (1970) (upholding eighteen-year-old vote for federal elections); United States Constitution, Twenty-sixth Amendment; *Wesberry v. Sanders,* 376 U.S. 1 (1964); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966); *Katzenbach v. Morgan,* 384 U.S. 641 (1966). In the political process, State party organizations have declined in influence. J. Saloma and F. Sontag, Parties: The Real Opportunity For Effective Citizen Politics (1972). The increased expense of political campaigns, together with campaign finance regulations, aid incumbents and reward candidates with personal fortunes or support from political action committees organized by corporate groups, trade associations and labor unions. In many elections, media has become more important to success at the polls than party loyalty. All these forces tend to lessen candidates' ties to the State as State. See D. Mayhew, Congress, The Electoral Connection (1978); Jacobson, *The Effects of Campaign Spending in Congressional Elections,* 72 Am. Pol. Sci. Rev. 469 (1978); Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3; *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam). The proportion of members of Congress with experience in State government has also declined. For example, in the Eightieth Congress, twenty-eight Senators had served as Governors, while in the Ninty-fifth Congress, only sixteen Senators had served as State Governors. A. Holcombe, Our More Perfect Union 205-06 (1950); M. Barone, G. Ugifusa, and D. Matthews, The Almanac of American Politics (1978) (*passim*). As a result of these and related changes, if the constitutional system mandates solicitude for State sover-

eignty, it must fall to the Court to provide the safeguards. *See generally* Kaden, *Politics, Money, and State Sovereignty: The Judicial Role,* 79 Colum. L. Rev. 847 849-68 (1979).

Defining the scope of the States' immunity from commerce regulations may not always be simple,[15] but ease of adjudication cannot be the test for the viability of a basic constitutional principle. As the Court observed in *National League of Cities,* "[i]f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their system for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence', *Coyle* [*v. Oklahoma*], 221 U.S. at 580." 426 U.S. at 851.

Thus, not only are the verbal tests of *National League of Cities* readily satisfied here, the fundamental principles underlying that decision compel invalidation of Congress' application of the Railway Labor Act to the labor relations of a State public transportation agency like the LIRR. The State of New York is plainly exercising its sovereign power in designing bargaining

[15] Justice Brennan's dissent expressed concern that the plurality opinion in *National League of Cities* articulated no effective limitation to the principle of immunity for State sovereignty. But his fear that the States might "engage in businesses competing with the private sector and then come to the courts arguing that withdrawing the employees of those businesses from the private sector evades the power of the Federal government to regulate commerce," 426 U.S. at 872, is unwarranted. The standard applicable to this case makes clear that a railroad like the California State Belt Line, which does provide a service commonly supplied by private investors, will not qualify for immunity; by contrast, a service such as the LIRR—critical to public welfare and supplied by the State—must be protected against Federal actions displacing the State's decision making authority.

Its lack of competition with private business also distinguishes the LIRR from the utility involved in *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, at 391 n.3, 403-08, 422 n.3 (1978). When parties are in a "competitive relationship such that each should be constrained, when necessary, by the federal antitrust laws," 435 U.S. at 422 n.3 (Burger, C.J., concurring), the fact that the State or its subdivisions is performing a "public function," in the sense that it is acting within its sovereign power, does not qualify it for protection. When, however, as in the case of the LIRR, the service is supplied solely by government and is one on which the public welfare depends, the case is strongest for judicial protection of the sovereign State's freedom to make policy choices.

procedures for State employees, in choosing to structure union organization on the basis of broader units of employees, in precluding the parties from negotiating pension benefits, and in banning all strikes by public workers. Each of these and other features of the Taylor Law represents a policy choice by the government of the State of New York, reached after full and feisty political debate. To allow the Federal government to cast these judgments aside and replace them with its own would have the effect of sanctioning a power that would "devour the essentials of state sovereignty" if unchecked. *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting), *cited with approval in National League of Cities*, 426 U.S. at 855.

### A. APPLICATION OF THE RAILWAY LABOR ACT TO THE LONG ISLAND RAILROAD DISPLACES NEW YORK STATE'S FREEDOM IN THE EXERCISE OF AN ESSENTIAL AND TRADITIONAL GOVERNMENTAL FUNCTION.

In offering examples of State activities to which the sovereignty-based immunity from Federal commerce regulations must apply—including "fire prevention, police protection, sanitation, public health, parks and recreation"—this Court made clear that the list provided in *National League of Cities* was "obviously not an exhaustive catalogue," 426 U.S. at 851 n.16; the services illustrated were merely "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. The Court went on to indicate that "[i]ndeed, it is . . . services such as these which the States have traditionally afforded their citizens." *Id.* At various places in the decision, the description of the protected activities as "traditional governmental functions" was interchanged freely with their characterization as "integral" or "essential" services.[16]

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[16] State activities protected against Federal regulation were described as "integral governmental functions," 426 U.S. at 851 and 855; and "traditional governmental functions, 426 U.S. at 852. Each phrase describes those functions "essential to separate and independent existence." 426 U.S. at 845. *See* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1172 (1977).

The clear import of the Court's approach in *National League of Cities* was that the constitutional immunity from Federal regulations commandeering a State's freedom of choice is triggered by public dependence on the particular government service at issue, not by its lineage or the length of time during which the State has been involved in its provision.[17] Governments provide services either because, like parks or correctional activities, no sufficient private interest exists or is likely to arise, or because, like schools and hospitals, the universal need commends the service to public officials concerned for the public welfare, notwithstanding the fact that it may be available to some through the private sector. In the case of urban mass transit, including bus, subway and commuter rail service, the lesson of the last three or four decades is that the economic reality makes private investment in these services unavailable. Government is left with the choice of abandoning the services, leaving the public to rely solely on private transportation, or of public ownership and operation of transit facilities.

Between 1940 and 1962 each of the subways and most of the bus lines in New York City came under public control. In the case of commuter rail service, the LIRR dropped straight from bankruptcy into public operation by a State agency. Other lines have gone through reorganization to control by federally chartered corporations or are subsidized by public funds while remaining in private hands. The State of New

[17] Except for one district court, the lower Federal courts have uniformly applied a functional rather than a time-bound test to qualify transit agencies for immunity from the Fair Labor Standards Act. *E.g., Kramer v. New Castle Area Transit Authority,* Civ. A. No. 80-1008G (W.D. Pa. June 11, 1981), *appeal docketed* No. 81-2223 (3d Cir. Aug. 10, 1981); *Dove v. Chattanooga Area Regional Transportation Authority,* Civ. A. No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed,* No. 81-5636 (6th Cir. Sept. 2, 1981); *Alewine v. City Council of Augusta, Georgia,* 505 F. Supp. 880 (S.D. Ga. 1981), *appeal docketed, No. 81-7490 (5th Cir. June 5, 1981); see, contra., Joiner v. City of Macon,* Civ. A. No. 79-287-MAC (M.D. Ga. April 24, 1981), *request for permission to appeal filed* (5th Cir. June 14, 1981). The Sixth Circuit has also applied a functional test of public dependence to apply *National League of Cities* to a municipally owned airport. *Amersbach v. City of Cleveland,* 598 F.2d 1033 (6th Cir. 1979).

York now faces a choice of taking over the Westchester commuter rail service, or operating it through Amtrak with continued subsidies from the State.[18] Nationally, publicly owned transit systems (55% of the total) account for 90% of all vehicles, 93% of all vehicle miles and 94% of all passenger trips. American Public Transit Association, *Transit Fact Book* (1981 ed.) at 43. Thus, while there remain several hundred small, privately owned lines, by 1980 transit service had become overwhelmingly a public function in the United States. J. P. Womack & A. Altshuler, *An Examination of the Transit Funding Process at the Local Level* (May, 1979).

In each case, the State must choose whether to continue a particular service at State expense. Once it is under public control, the State government must decide how much of the cost for each ride is to be obtained from user fares, and how much from general tax revenues.[19] Of necessity, tax revenues are obliged to carry a large proportion of the cost. In the MTA, subsidies from Federal, State and local government account for 49% of operating costs on the bus and subway system, and 56% on the Long Island Railroad. MTA 1981 Operating Budgets.

In an environment such as New York City, abandonment of public transportation is not a realistic option, for economics,

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[18] The MTA now contracts with ConRail for the Hudson and Harlem commuter line serving Westchester County, and, together with Connecticut, also subsidizes ConRail service on the New Haven Railroad. Under these contracts, the States are responsible for funding all operating deficits and capital improvements as well as for all decisions on fares, schedules, consists and service standards. This year, Congress gave the States responsible for these commuter railroads an option of direct take-over or continuation of the service by Amtrak Commuter, the newly created federal entity responsible for commuter passenger rail service. Northeast Rail Service Act of 1981, Pub. L. No. 97-35, § 1137, 95 Stat. 648-52. Unless the State fully subsidizes the service, Amtrak Commuter is authorized to discontinue it. 95 Stat. 649. Congress plainly wants the States to take over these facilities, but it expressly refused to rescue State-owned railroads from the RLA procedures. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1157, 95 Stat. 681.

[19] In 1980 state and local subsidies provided 40.0% of the cost of transit operations across the nation and federal grants accounted for 17.3%. *Transit Fact Book* (1981 ed.), at 45. The federal program is scheduled for sharp reductions beginning in fiscal 1983 and elimination by fiscal 1985. Wall St. J., Oct. 22, 1981 at 29; N.Y. Times, Apr. 9, 1981, § B, at 13.

pollution control, energy and social welfare require that the State continue transit service. Provision of bus, subway and commuter rail facilities has thus become a critical component of the function of government in New York. In addition to their claim on public budgets, these services command as large a proportion of the time, attention and human resources of elected officials, civic groups, business interests and the press as any other service New York supplies. Simply put, the reason is that without public transit, the City of New York could not survive as a vital entity.[20]

The New York State Legislature attested to the public dependence upon transit service, including the LIRR, in 1981 when it declared "a transportation emergency" in the MTA district because the subway, bus and commuter railroad systems

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[20] 61% of the City's work force uses public transportation. School of Urban Sciences, University of Illinois, Moving People—An Introduction to Public Transportation, Jan. 1981 at 19. More significantly, 90% of all persons coming into the central business district each day arrive by public transportation. *Id.* at 5. Of course, interruption or even reduction of transit service causes traffic problems which affect everyone living or working in the area. For example, after Chicago was forced by budget shortfalls this year to increase fares and reduce transit services, ridership dropped 11.5% in one month and major arteries into the downtown section "have remained clogged by traffic for long periods every day." N.Y. Times, Oct. 18, 1981 at 32. Chicago's experience also indicates that labor relations are central to the City's transit difficulties—the employer is now seeking to renegotiate labor contracts and the union is challenging lay-offs in arbitration. *Id.*

The New York Court of Appeals has recognized this crucial link between transit service and the City's well-being:

> [F]or this city, the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare. It is worth reemphasizing that the subways are the city's arteries upon which its life and daily living depend***.

*Lerner v. Casey*, 2 N.Y.2d 355, 367, 161 N.Y.S.2d 7, 16 (1957), aff'd 357 U.S. 468 (1958) *quoting New York City Transit Authority v. Loos*, 2 Misc. 2d 733, 738, 154 N.Y.S.2d 209, 214 (1956). When a strike disrupted bus and subway service in 1980 for eleven days, the city economy lost more than one billion dollars. Cirrilo, *New Yorkers Ride Again*, Associated Press, April 12, 1980, *cited by* the court of appeals, Pet. App. 15a n.19.

"are faced with a need for additional capital funds . . . Unless such funds are obtained . . . the transit and transportation system servicing this district will deteriorate, and a clear and present danger would result to the health, safety and welfare of its inhabitants . . ." 1981 N. Y. Laws, ch. 314, § 1. The legislation authorized the MTA to proceed with its $7.9 billion plan for improvement of its subway, bus and commuter railroad system—a system which carries "six million passengers a day, or one out of every three persons who use public transit in the entire nation," and operates more vehicles "than all other transportation systems in the United States combined." *Id.* About $750 million of these capital improvements will be allocated to the LIRR, and another $750 million will be spent on other MTA commuter rail services. MTA Submission to the MTA Capital Program Review Board (Sept. 25, 1981).

In the constitutional sense, therefore, the provision of transit service by the State of New York is precisely the kind of function which government was "created to provide," *National League of Cities, supra,* 426 U.S. at 851, and precisely the kind of service the State has "traditionally afforded [its] citizens." *Id.* Respondents intend that statement not in the sense that the State of New York in 1800 or 1850 provided commuter rail service but rather to refer to the State's historic and traditional responsibility to provide those public services upon which the public most relies, and to respond to public needs for the services deemed most urgent at any particular time. At some time in the past, construction of a network of highways or provision of sanitation service was most essential to the economic and social well-being of the New York region. Tomorrow, the critical need may be different if economic and technological circumstances impose other responsibilities for the protection of the public upon the States or their subdivisions. At the present, the pressing need is for commuter rail service and other forms of mass transit.

Of course, the Constitution does not require that *any* service which the State chooses to provide be deemed immune from Federal commerce regulations. That is the point which

underlies this Court's distinctions between the problem presented in *National League of Cities* and cases that have applied Federal regulations of safety, employers' liability or labor relations to State-owned railroads. Those cases are clearly distinguishable from the instant action as well, because both the State Belt Railroad in *United States. v. California,* 297 U.S. 175 (1936), and *California v. Taylor,* 353 U.S. 553 (1957), and the Alabama railroad in *Parden v. Terminal R. Co.,* 377 U.S. 184 (1964), were solely involved in the carriage of freight. It is only the LIRR's carriage of a minimal amout of freight that serves to bring it within the terms of the Interstate Commerce Act, thereby eliminating any dispute regarding its coverage by the RLA. By contrast, in the rail freight cases, it was the specific nature of the States' function which warranted Federal regulation of their activities. In each instance, the State had elected to become involved in an activity generally and routinely provided by private investors. Both Alabama's Terminal Railway and the California State Belt Railroad performed commercial services for profit under statutory authority granted them by the State legislatures.[21] And much as South Dakota is

[21] Both the Alabama and California railroads operate under State charters, and both are obliged to apply their net proceeds to harbor or dock improvments, in much the same way the Port Authority of New York and New Jersey applies the net revenues from its bridge and tunnel facilities to offset losses in its commuter rail service, the PATH line between New Jersey and New York City. *See United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977). Similarly, the MTA is authorized by State law to use the surplus revenues from the Triborough Bridge and Tunnel Authority for the benefit of its bus, subway and commuter rail transit services. N.Y. Pub. Auth. Law §§ 569 c.1, 1219-a, 1277-a (McKinney, 1970 & Supp. 1980-81) as amended by 1981 N.Y. Laws, ch. 314. The statement made by Petitioner that the State Belt Railroad operated "without profit" is both irrelevant and misleading. It is irrelevant to the determination whether it was the kind of service also provided by private investors, and it is misleading in that the statutory scheme allocated the net revenues or "profits," which certainly existed, to harbor improvements. In the sense of "without profit for investors," it was a non-profit activity, but it was not unprofitable in the more usual sense of revenues exceeding expenses. By comparision, LIRR revenues from rail service amount to only about 44% of the cost of operations, with public subsidies making up the difference.

currently involved in the manufacture of concrete, *see Reeves, Inc. v. Stake,* 447 U.S. 429 (1980), the States' involvement in interstate transportation of freight by rail was largely a result of historical circumstance.

Immunity from commerce regulation is not governed by an assessment whether an activity is or is not profitable—respondents do not urge the kind of "proprietary"—"governmental" distinction rejected by the Court in *New York v. United States,* 326 U.S. 572 (1946). Rather, there was no immunity from Federal commerce regulations for the California or Alabama railroads because the States were not involved in any way in the kind of activity for which governments are created. They were not engaged in administering public law; nor were they furnishing those public services upon which the public welfare depends. By contrast, the people of New York have an extraordinary and special need for public transportation, which only the State of New York is available to satisfy. In this respect, transit, including the Long Island Railroad, is indistinguishable from police protection, fire prevention, sanitation, parks and recreation—each a service on which the people truly depend. Nor is the immunity sacrificed because there exist private forms of transportation, such as the automobile, or because the rider pays a part of the cost of the LIRR service, any more than the State's immunity can be lost because there exist private security companies and proprietary hospitals, or because in a particular State there is a special assessment for garbage pick-up.

There can surely be no doubt that the Long Island Railroad is an integral part of the transit system of the New York region,[22] and an integral part of the State's traditional

[22] But for the insistence by Petitioner to the contrary, the classification of the LIRR as a transit service would seem self-evident. *See* Pet. Brief at 40-41. Virtually all the railroad's daily riders are engaged in the kind of same-day trips which characterize "transit" facilities. About 70% of all daily passengers are work-to-home and home-to-work commuters. Jt. App. 35. Summer transport to Eastern Long Island beaches, emphasized by Petitioner, accounts in fact for a small fraction of LIRR service. Trips to and from the vacation area amounted to under 0.5% of all passengers in 1979. MTA 1979

function of providing those public services most needed by the people in circumstances where there is no private sector alternative to the public service. Even those persons in New York who never ride the railroad or the subways are entirely dependent upon their existence. Abandonment would strangle the economy of the city and cause havoc for all New Yorkers.

Petitioner and *amicus* United States press the contention that notwithstanding the vital public need which is served by the LIRR in the provision of commuter transit service, its protection from Federal commands issued under the commerce clause disappears because the State also uses its railroad to transport some freight cars from Queens, where they can be interchanged with interstate freight trains, to points on Long Island. If the constitutional immunity otherwise exists, it cannot possibly be sacrificed because 4% of the railroad's revenue—or 0.5% of the MTA's expense budget of $2.4 billion in 1981, MTA 1981 Operating Budgets, or the work of 307 of the Authority's 53,000 employees—relates to freight rail service.[23]

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*(footnote continued)*
Annual Report, at 8; LIRR Report of Station Ticket Sales. The American Public Transit Association includes commuter railroads in its record-keeping for "transit systems." *Transit Fact Book* (1978-1979 ed,), at 3-9, 48-49. Congress includes commuter rail services in its definition of eligible recipients for mass transit grants, and bases the formula for distributing two-thirds of the "third tier" of its Sec. 5 Operating Aid on the number of commuter rail miles operated in a particular area, 49 U.S.C. § 1694(a)(3)(A)(i) (Supp. III 1979). The House Report on the Urban Mass Transportation Act of 1964 routinely referred to commuter rail in general and the LIRR in particular as part of the transit industry. H.R. Rep. No. 204, 88th Cong., 1st Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News at 2575, 2576, 2577, 2579, 2580, 2590, 2591. The press obviously regards commuter railroads as part of "transit" services. *E.g.*, N.Y. Times, July 2, 1981, at 1; Philadelphia Bulletin, July 5, 1981, at 1.

[23] Petitioners emphasize that twelve of eighteen commuter rail services are privately owned, Pet. Brief at 14. In fact, by 1980 only ten of these lines remained. *Transit Fact Book* (1981 ed.) at 18-19. They ignore, however, that all eighteen lines depend upon State and local subsidies so that in 1980 expenses ($973 million) exceeded operating revenues ($436 million) by $537 million, up from a total deficit of $408 million in 1978. *Transit Fact Book* (1978-1979 ed.) at 74-75; (1981 ed.) at 69. The values of State sovereignty would be

Our Constitution has endured because of its capacity to adapt to changing economic and social environments unforeseen by its draftsmen. The framers cared not whether sanitation service or transit was then, or would become, a State function, for they foresaw that the role of State government was destined to change as economic and technological developments placed new items on its agenda and removed others from the list of concerns. Even today, where commuter rail transit is vital to the economic and social well-being of New York, some other transit mode may be needed in another state. Tomorrow, sanitation service may fall under private control in one part of the country, but consume the largest part of public budgets and governmental attention in another.

The scope of the immunity from Federal regulation which safeguards the States' sovereignty need not be readjusted to each shift in the economy. It must be rooted instead in government's need for the autonomy to choose among competing demands for essential services, and to allocate its limited resources to those services which best serve the public welfare. If this process of choice is the essence of sovereignty, commuter rail service surely qualifies as a "traditional" governmental function, for it is precisely the kind of service the government of the State of New York was created to provide. The MTA and LIRR are thus entitled to application of the immunity secured by *National League of Cities* against commerce regulations displacing the State's freedom to make sovereign decisions.

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*(footnote continued)*
fragile indeed, if a State jeopardized its autonomy by making available its intrastate transit facilities for some freight shippers. The standard urged by the UTU would reduce *National League of Cities* from a crucial restatement of the federalism values embedded in the Constitution to an aberrant ruling of no enduring significance. While some may urge just that result, *National League of Cities* itself brims with recognition of the Court's responsibility to protect the States against national regulations which impair their effectiveness in the Federal system.

## B. THE STATE'S POWER TO STRUCTURE ITS RELATIONS WITH ITS EMPLOYEES IS A BASIC ATTRIBUTE OF ITS SOVEREIGNTY.

In *National League of Cities*, the Court concluded that both the minimum wage and maximum hour regulations of the Fair Labor Standards Act "impermissibly interfere[d] with the integral governmental functions of [States and local governments]." 426 U.S. at 851. Among the congressional commands which unconstitutionally infringed State sovereignty were the requirement that overtime be compensated in cash and not in time off; the submission to the courts of the issue whether a person was an employee or a "volunteer"; and the effect of the minimum wage on the government's capacity to offer summer jobs to teenagers or employment to casual workers. 426 U.S. at 850-852. These employment decisions were deemed to be attributes of sovereignty regardless of any "particularized assessments of actual impact" on state or local governments. 426 U.S. at 851. If a State's decision to employ teenagers at less than the minimum wage, to structure police work schedules into 24-hour shifts, or to offer compensatory time off to its secretarial staff are attributes of sovereignty, then the freedom to structure employee relations for thousands of commuter railroad employees must surely qualify.[24]

The introduction of collective bargaining and union organization into the relation between government and its employees has had a profound impact on the political process. The question whether that effect is or is not salutary is a matter for legislative judgment, not at issue in this case. But there can be no doubt that the establishment of bargaining procedures for public employees, including legislative protection of their right to join a labor organization and to negotiate collectively, has the effect of singling out one of the interest groups contending for scarce public resources—the public workers and their

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[24] Wages and benefits account for about 75% of operating expenses in the transit industry. Institute of Public Administration, Financing Transit: Alternatives for Local Government, July, 1979, at 8; *Transit Fact Book*, (1981 ed.) at 49.

unions—and affording them a special vehicle for participating in the political process by which those resources are allocated. *See generally,* H. Wellington and R. Winter, The Unions and the Cities (1972). For all other groups, including welfare recipients, commuters, small businessmen and consumers, there remains only the right to petition elected officials. But once collective bargaining is introduced to government labor relations, employees enjoy by legislative sanction a special means for putting pressure on State government.

Some see this choice as necessary to assure just treatment and participation to public employees in the process of determining the conditions of their work. Others view the process of bargaining with public workers as an excessive delegation by the government of its responsibility for employment decisions. *See, e.g.,* B. Aaron, J. Grodin, J. Stern (eds.), Public Sector Bargaining (1979); H. Wellington and R. Winter, The Unions and the Cities (1972); D. Stanley, Managing Local Government Under Union Pressure (1972). Whatever one's view of the merits, it is plain that the determination of policy in this area is one of the most important sovereign choices made by any State.

Across the country there are wide variations in labor relations procedures for government employees. *See Summary of State Labor Laws,* 1 [Ref. File] Gov't Empl. Rel. Rep. (BNA) 51:501-30 (April 20, 1981). Without exception, however, the choices made by governments vary dramatically from the policy choices now well established in the private sector of the economy under the National Labor Relations Act and the Railway Labor Act. *Compare* ch. 7 *and* ch. 11 in D. Bok and J. Dunlop, Labor and the American Community (1970).

The Taylor Law differs from the Railway Labor Act in several critical respects:

(1) Like virtually every State labor relations statute, the Taylor Law bans all strikes by public employees, and provides statutory penalties for violations of that prohibition. *See Summary of State Labor Laws, supra.* Prohibit-

ing the right to strike does not always eliminate the strike threat from bargaining, but the penalties provided in the statute or available in State courts are evidence of the State's considered decision that the strike weapon is inconsistent with government's sovereign responsibilities for the assurance of uninterrupted service, as well as the State's considered decision that legalizing strikes by government workers would distort the political process by giving public unions an excessive influence over government's allocative decisions. Even if one disagrees with that analysis, no one can doubt that the force of the argument has so far prevailed in legislative debates throughout the country for Federal, 5 U.S.C. §7311 (1976), as well as State and local workers.

(2) While the Railway Labor Act favors craft-based bargaining units—an emphasis which accounts for the fragmentation of the LIRR's work force into 23 separate units—the Taylor Law calls for the fewest possible units consistent with fair treatment for public employees.[25] As a result, in the bus and subway systems where employees perform tasks similar to those of LIRR workers, operating and maintenance employees are organized along industrial lines into one unit covering a variety of different skills and classifications.

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[25] The employees themselves have considerable influence over the determination of separate craft units. *In re Long Island Railroad Company*, 8 NMB No. 89 (1981), 45 U.S.C. § 151, cl. Fifth, § 152, cl. Fourth (1976). By contrast, the New York legislature provided for protection against this kind of fragmentation of bargaining units. N.Y. Civ. Serv. Law § 207(1)(c); *Final Report of the Governor's Committee on Public Employee Relations* (1966) at 10-13; *Civil Service Employees Ass'n v. Helsby*, 25 N.Y.2d 842, 303 N.Y.S.2d 690, 250 N.E. 2d 731 (1969) (only five units designated for 150,000 State government employees). Unlike the Federal sanction of "an appropriate unit," the New York State Public Employment Relations Board has consistently found that the "most appropriate unit is one which joins the greatest number of employees possible without risking conflicts within the group." *E.g., In re Board of Education of the City of New York*, 6 PERB ¶6-4011 (1973); *In re Malone Cent. Sch. Dist.* 1 PERB ¶1-399.29 (1968). Under the New York law, occupational or craft differences "do not warrant fragmentation" of units for bargaining. *In re BOCES, Nassau County*, 4 PERB ¶4-4021 (1971).

(3) While the Long Island Railroad has been obliged under the Railway Labor Act to bargain over pensions, the New York Legislature, after a brief experience under the Taylor Law, decided to eliminate this subject from the negotiation process. 1973 N.Y. Laws, ch. 382 §6; N.Y. Civ. Serv. Law §201, cl.4 (McKinney Supp. 1980-81).

(4) Finally, in many other areas—including judicial review of arbitration awards, rules of access to employer's property during organizational campaigns, the lawful scope of mandatory bargaining, the relationship of collective bargaining to the obligations imposed on employers by other public laws, the union's duty of fair representation, the administrative board's power to remedy unfair labor practices, the availability of injunctive relief against concerted activity by employees, the scope of protected concerted activity, and a host of other issues—both the statutory framework and the decisions of courts and administrative agencies differ widely, reflecting the basic fact that the constraints which shape employment relations in the public sector differ from those which influence employment relations in the public sector of the economy. Not the market but the political process guides participants in government labor relations. The difference is substantial; it is reflected throughout the legal rules, precedents and practices.

Once a service industry like the Long Island Railroad comes under government's control, it is obliged to function under the standards applicable to government. Whatever the appeal of private sector "efficiency," a government cannot be run like a business because the pressures, the demands and the obligations are not the same.[26] Government agencies, in-

[26] The labor relations experts who drafted the Taylor Law explained this point in their *Final Report* submitted to Governor Rockefeller on March 31, 1966: "Collective bargaining including the right to strike, is recognized as an essential democratic right of employees in the private enterprise sector . . . Instead of the constraints of the market place on collective bargaining, including the right to strike . . . negotiations in the public sector are subject to the constraints imposed by democratic political processes . . . a strike by

cluding the MTA and the LIRR, exist primarily to serve the public welfare by providing services upon which the public depends. Private businesses exists in the marketplace. To succeed, they must supply goods and services the public wants; to survive, they must do so on a profitable basis by competing successfully with other groups. Competition imposes realistic constraints on the process of collective bargaining. No private entrepreneur could operate the Long Island Railroad today. If one existed, the State of New York would not have taken over the line and expended hundreds of millions since 1966 to maintain the service. And when a State structures the kind of employment decisions involved here—decisions even more critical to the government's interest than the choices at issue in *National League of Cities*—it exercises the freedom over integral decisions which is the cornerstone of its separate and independent sovereign existence.

Petitioner and *amicus* United States attempt to evade these realities by suggesting that the choices made by New York in adopting the Taylor Law are somehow "merely procedural", and not sufficiently important to government's functions to qualify as "matters indisputably 'attributes of sovereignty'." *National League of Cities,* 426 U.S. at 854; *Hodel v. Virginia Surface Mining and Reclamation Association,* slip op. at 21. The argument seeks to gainsay the fact that the way the State chooses to structure its own employer-employee relations fundamentally affects every service it provides, every budget determination it makes and every public law administered by an agency of the State or its subdivisions. Nothing could be more plain than the proposition that a lawful right to strike or a craft-based principle of union organization would have a fundamental effect on New York's basic policy choices.

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*(footnote continued)*
government employees (there can scarcely be a countervailing lockout) introduces an alien force in the legislative processes." *Final Report,* Committee on Public Employee Relations, at 14-15. The market constraints which discipline the parties to collective bargaining in the private sector include the risk that customers faced with a disruption of service because of a strike will find substitutes for that service. When a strike stops operations on a freight railroad, shippers may resort to truck transport. No substitute exists, though, for the rail transit service upon which 260,000 LIRR daily passengers depend.

If a State were to decide, as almost half the States still do, to eliminate collective negotiation in government and return to unilateral determination of wages, hours and working conditions by the employer, it would surely matter to the State's freedom whether the Federal government could step in to prescribe application of the National Labor Relations Act or the Railway Labor Act to employees providing essential State services. If, on the other hand, the State chose to have labor contracts settled by binding arbitration—as many States, including New York, now provide for certain types of employees, such as police and fire units—it would also surely affect its freedom to make essential decisions if the Federal government intervened with regulations authorizing these unions to strike, by placing them under the jurisdiction of the Railway Labor Act or the National Labor Relations Act. In either case, this Court would surely have no difficulty perceiving that the Federal regulation addressed matters "indisputably attributes of state sovereignty." But a choice of precisely the same quality and magnitude is what is at issue here in the application of the Railway Labor Act to the Long Island Railroad.

It can be no answer to call these choices merely "procedural." They go directly to the heart of the allocation of political responsibility between elected representatives and private interest groups or private associations of employees. Whether the congressional choice is more just or more equitable is not the issue. Short of abridging some specific constitutional right, *see Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), the State's freedom to decide these vital employment relations matters affirmatively limits the Federal government's authority to regulate commerce. This is so because, as this Court said in *National League of Cities,* the "State is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy, *Kovacs v. Cooper,* 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring), but is itself a coordinate element in the system established by the framers for governing our Federal Union." 426 U.S. at 849.

## II. THE FEDERAL INTEREST IN THE APPLICATION OF THE RAILWAY LABOR ACT TO THE LONG ISLAND RAILROAD IS NOT SO "DEMONSTRABLY GREATER" AS TO JUSTIFY STATE SUBMISSION.

Both the RLA, and the Taylor Law serve the governmental interest of avoiding interruptions in service by providing for orderly settlement of labor disputes. But that general statement of common interest belies the altogether different perspectives of the two statutes.

In adopting the RLA in 1926, Congress was concerned with regulating labor relationships in private, investor-owned transportation companies. The legislators began with the premise that through free and unfettered collective bargaining, including the possibility of a strike or lockout, disruptive disputes might be minimized without involving the government in the determination of working conditions. Collective freedom of contract was substituted for the individual contract of hire, in order to secure the associational rights of workers and to regularize the process of voluntary wage determination.

In the Taylor Law, by contrast, there was no issue of minimizing government's role. Government is the employer. By adopting that law, the legislature decided to share some of its responsibility for wage determination with employee representatives through the process of collective negotiation. It also decided to secure the government and the political process against the effects of strikes by public workers.

Seen in this light, the State's interest in designing employee relations procedures is paramount. While the State is, in effect, designing and affecting its own political process, the Federal interest is truly trivial. Only the small fraction of freight service on the LIRR establishes National Mediation Board jurisdiction over the line. In 96% of its activity as measured by revenue, or 98% as measured by railcar mileage, the LIRR is an intrastate passenger line outside any congressional concern expressed in the RLA. Against the State's concern that the employees not exercise more influence over policy determination, the Federal interest in uniformity has little impact.

The Federal concern here pales when contrasted with the emergency legislation to combat a severe inflation rate "which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." *Fry v. United States,* 421 U.S. 542, 548 (1975); 426 U.S. at 853. In addition, since the statute at issue in *Fry* simply froze wage scales and imposed no affirmative burdens on the State, the interference with State choices was small. This factor, too, supports the Court's decision rejecting the claim of the State in that case. In the area of environmental protection, the Federal interest in uniform application of regulations may also be stronger, given the possibility that non-compliance by State facilities could frustrate achievement of the Federal goal. *See, e.g., Friends of the Earth v. Carey,* 552 F.2d 25 (2d Cir.), *cert. denied,* 434 U.S. 902 (1977). No risk of that sort exists here. To recognize the State's choice in the Taylor Law of a method for affording protection against interruptions in service will have no effect on the 99.9% of all freight railroad activity still subject to Federal labor procedures.

Even if the State's immunity might be forced to submit to a greater Federal interest in some other case, the RLA offers no foundation for such a conclusion here. Any evaluation comparing the effect of the Federal regulations upon national interests with its decisive impact on State sovereignty compels a judgment invalidating the application of the Railway Labor Act to the Long Island Railroad.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed, and the Railway Labor Act declared invalid as applied to the Long Island Railroad.

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No. 80-1925

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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UNITED TRANSPORTATION UNION,
*Petitioner,*

v.

LONG ISLAND RAILROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

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### ARGUMENT

1. Contrary to the underlying premise of opponents' briefs, this is not a case of federal intrusion into an area of State prerogative in the existing structure of federal-state relations.

The instant case, unlike *National League of Cities v. Usery*, 426 U.S. 833, does not concern itself with functions like fire prevention or police protection, which have historically been recognized to be the responsibility of local government. Here the concern is with a railroad, and more specifically with the proposed displacement of federal railway legislation long applicable to the Long Island Railroad and not disputed until fourteen years after it was acquired by the State of New York.

The long history of the American railroad industry and of government involvement in that industry is dis-

cussed in Petitioner's Brief (hereinafter designated "Pet. Br.") at 23-31. The crucial aspects of that history, in the instant connection, are that the ownership and operations of interstate railroads of all kinds—freight, passenger, and commuter—have predominantly been in the private sector, and that government involvement has at all times been the province of the federal government, taking the form of a wide variety of statutes enacted under the Commerce Clause. The "consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included," and this Court has held that Congress followed that pattern in the Railway Labor Act, intending to extend its provisions to all interstate railroads, private and public. *California v. Taylor*, 353 U.S. 553, 564.

2. When the State of New York in 1966 acquired and began to operate the Long Island Railroad, this pre-existing body of federal regulation was not imposed upon the new owner by reason of its Statehood. The State had chosen, rather, upon policy considerations of its own, to enter into a field long settled to be constitutionally subject to such regulation. It had taken over a railroad that had "historically considered itself a 'carrier' within the meaning of the [Railway Labor] Act, the Interstate Commerce Act, . . . and related statutes" and had "consistently filed reports required by the Interstate Commerce Act with the ICC" and whose employees had "consistently received the benefit of the Railroad Retirement Act, the Railroad Unemployment Insurance Act, and the Federal Employers' Liability Act." (Findings, Appendix to the Petition (hereinafter designated "Fdgs., Pet. App.") at 35a-36a). Even after the takeover, the State made no change in this regard, the LIRR continued to characterize itself as "a Class I steam railroad . . . engaged in business as a common carrier for hire in the transportation of passengers and property in interstate and foreign commerce" (Pet. Br., at 8, 9). Indeed in the very dis-

pute "which lies at the heart of this action, the Railroad has affirmatively sought to invoke the collective bargaining and mediation procedures set out in the [Railway Labor] Act, including the establishment of a Presidential Emergency Board" (Fdgs., Pet. App. at 36a).[1]

New York made no change in its posture in this regard until fourteen years after it acquired ownership, when on February 8, 1980, in the course of the instant litigation, it undertook to substitute New York labor law for federal labor law by transforming the LIRR from a private stock company to "a public benefit corporation whose employees would [for the first time] be facially subject to the Taylor Law" (Fdgs., Pet. App. at 31a). The railroad's "essential character within this context" was not changed by this "simple expedient of reorganizing its corporate structure under state law" (Fdgs., Pet. App. at 36a).

On this record, respondents cannot now reasonably contend that "Congress has interposed a Federal regulation which commands New York to apply to a transit service [the LIRR] . . . procedures designed for and best suited to privately-owned railroads or airlines." Respondents' Brief (hereinafter designated "Resp. Br.") at 15. New York chose to acquire and operate a railroad that was subject to those very procedures. The existence of those procedures was an intrinsic aspect of the field the State chose to enter; it was not a diminution of the State's freedom to decide but a consideration to be evaluated by the State in making its decision.

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[1] And, of course, the LIRR continues to seek rate adjustments under the Interstate Commerce Act. *See* ICC *Ex Parte* No. 299 (Sub. No. 1), Increases in Freight Rates . . . of the LIRR and No. 36874 (1981), *appeals docketed*, No. 81-4139 (2nd Cir., Aug. 7, 1981) and No. 81-4306 (5th Cir., Aug. 7, 1981); and Application for a Staggers Act Surcharge, filed with the ICC, on September 12, 1981, under same style. *See also*, in connection with these ICC proceedings, *LIRR v. Aberdeen & Rockfish Railroad Co.*, 439 U.S. 1.

3. At the heart of respondents' argument is the expressed assumption that immunity under the Tenth Amendment "must turn on the fundamental dependence of the public on the service involved" (Resp. Br., at 11 and *passim.*). The assumption is erroneous and rests on a distortion of *National League.* The test laid down in *National League* is not whether the activity in question is essential to the public, but whether it is essential to the existence and functioning of the State as a State (426 U.S. at 845 and *passim.*). The community's need for a particular economic service may properly move a State to remedial action—by regulation, subvention, promotion, tax remission, or even direct provision of the needed service. But when the State chooses the last mentioned course, and enters into an activity traditionally the function of private business, it does not thereby endow that activity with the aura and immunities of sovereignty. *Cf. Helvering v. Powers*, 293 U.S. 214, in which the City of Boston's need for adequate local transportation was held not to prevent application of the federal tax laws to a publicly operated street railway, since the provision of that service by the State was "distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State" (*id.*, at 227). *Cf.* also *Ohio v. Helvering*, 292 U.S. 360, 368, 371.

This distinction is stressed throughout *National League*, which repeatedly equates the functions that are immune from Commerce Clause regulation with those that are the activities of "States *qua* States" and are "essential to [the States'] separate and independent existence" (*e.g.*, at 845, 847, 851, 852). *See also Hodel v. Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981). *And see Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 423, 424 (conc. op. of the Chief Justice):

> The *National League of Cities* opinion focused its delineation of the "attributes of sovereignty" . . . on a determination as to whether the State's interest involved "functions essential to [its] separate and independent existence.'" [citation omitted] It should be evident . . . that the running of a business enterprise [and hence "the supplying of electricity"] is not an integral operation in the area of traditional government functions.

Respondents' metaphor "life blood of the community" is no more apropos of passenger railroad service than of the "supplying of electricity" in *Louisiana Power* or of the many services upon which our local communities are dependent—among others, the distribution of gas, oil, and other forms of energy, the provision of food and drugs, and the utilization of communication channels. All are subject to a variety of federal programs necessarily requiring nationwide application without differentiation between public and private ownership. *Cf. Bus Employees v. Wisconsin Board*, 340 U.S. 383, holding that "federal labor legislation, encompassing as it does all industries 'affecting commerce,'" overrides state public utility policies designed to ensure an uninterrupted supply of "'essential public utility service,'" including among such services: "water, heat, gas, electric power, *public transportation*, and communications" (at 388, 391, emphasis added).

Respondents themselves concede, in distinguishing *United States v. California*, that federal regulation would be constitutionally permissible if the LIRR were exclusively engaged in the carriage of freight (Resp. Br., at 23). Yet the freight operations of a railroad—the carriage of coal for industrial and domestic purposes, of raw materials to keep factories operating, of finished products to keep businesses moving, of mail to complete the communications network—are surely as essential to the economic life of the community as is the transportation of passengers. Clearly, the respondents' test—public dependence on the particular service—goes too far. The correct test,

confirmed by *National League*, is not whether the public needs the State to operate the railroad, but whether the State needs to operate the railroad in order to be a sovereign State.[2]

4. Concededly, the term "traditional government functions," as used in *National League*, obviously is not limited to functions which the States performed in 1789. It is equally clear that the word "traditional" loses its meaning when stretched to cover surveys of "competing demands for essential services" by any given State government at any given time, as respondents contend (Resp. Br., 26 and *passim*).

The Court's repeated reference to the "traditional" recognition of an activity as an integral governmental function cannot, as respondents' would have it, be cavalierly dismissed as having no reference to time or custom (Resp. Br., at 11, 12). The heavy stress in *National League* on the "traditional" functions of State government must be read to reflect an historical perspective, one which looks not to the current importance of the activity to the public, but to its standing under time-honored and well-rooted conceptions of the essential nature of State government within the federal-state system. While a function unknown in 1789 may come to be traditional after a sufficient period of widespread, consistent integration by the various states into the core prerogatives of state governments, as in the case of fire protection and police protection, this is hardly the case with railroads, freight or passenger, as appears from the discussion of the history and current structure of the railroad industry (Pet. Br., at 23-31). No matter how broadly the term is

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[2] Respondents' "public dependence" argument fails also in that it is based upon the special conditions asserted to prevail in the New York City area. But the question presented by this case is one of the limits of federal power. There cannot be one rule for the City of New York and others for other localities. "The needs of the subject matter manifestly call for uniformity." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 349 U.S. 369, 381.

read, a "tradition" cannot be created by the action of a single State with respect to a single railroad, upon a theory belatedly asserted in connection with a particular law suit and maintained only with respect to the particular statute upon which that litigation is based.

5. In short, *National League* speaks not in terms of fundamental dependence of the public on the service involved but in terms of services "in an area which the States have regarded as integral parts of the governmental activities" (*id.*, at 854, n.18). Respondents have not shown that the States have ever so regarded the operations of railroads engaged in the transportation of freight and of passengers. The contrary is true. All commuter railroads of this character, whether privately owned and privately operated, publicly owned and privately operated or, as in New York, publicly owned and publicly operated, have at all times considered themselves subject to the Railway Labor Act, the Railroad Retirement Act, the Interstate Commerce Act, and all of the other federal railroad laws, except for the rare challenges in particular connections rejected by the Courts, as in *California vi Taylor*, 353 U.S. 553, and *United States v. California*, 295 U.S. 175. New York alone began to deviate from this pattern during the course of this litigation and its deviation has been limited to the single subject of labor relations. In all other respects New York still regards LIRR as a railroad subject to federal railroad laws. *See Long Island Railroad v. Aberdeen & Rockfish Railroad Co.*, 439 U.S. 1, in which LIRR was the petitioner before this Court.

6. In sum, there is no substance, we submit, to respondents' contention that the States have a sovereign right, superior to that of the United States, to use *on their own terms* a railroad which, although heavily engaged in carrying passengers, is also, in the words of the Court below, "a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (Pet. App., at 9a). The paramount purpose of the

Commerce Clause is to grant the United States the authority the Confederation lacked to take all steps necessary and proper to establish and maintain an integrated nationwide economic system (*See particularly* Mr. Justice Jackson's discussion of the Commerce Clause in *Hood & Sons v. DuMond*, 336 U.S. 525, 532-534). As has been recognized from the beginning, the very core of that authority is the superintendence of the means of transportation by which interstate commerce moves throughout the Nation (*See, e.g., Gibbons v. Ogden*, 9 Wheat. 1). Whatever may be the rule in other respects, certainly when the question is the primacy of the competing claims of the United States and a State to regulate "common carriers by rail in interstate commerce," it "is not a controversy between equals . . . [; and] the interests of the Nation are more important than those of any State" (*Sanitary District v. United States*, 266 U.S. 405, 425-426).

> The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. [*Houston E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342, 351.]

The result must be the same whether or not the interstate carrier is owned by a state and whether or not that carrier performs important local functions in addition to its interstate freight activity.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.[8]

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[8] The issue whether city trolleys, buses, and subways are within the area that States have traditionally regarded as integral parts of their governmental activities is not presented by this case, in which we deal with an interstate railroad. It is difficult to conceive of any other American industry that has been so thoroughly regulated by federal law over so long a period as the "railroad world" which this Court has described as "a state within a state" . . . [with] its own customs and its own vocabulary, and . . . rules of its own making" (*California v. Taylor*, 353 U.S. at 565).

The question as to city transit is moreover directly presented in a case noticed for appeal to this Court (*San Antonio Metropolitan Transit Authority v. Donovan*, Civ. A. No. SA-79-CA-457, (W.D. Tex., Nov. 17, 1981, *notice of appeal filed*, Dec. 16, 1981), and in several other 1981 decisions in which appeal proceedings are pending in the Courts of Appeals. *Kramer v. New Castle Area Transit Authority*, Civ. A. No. 80-1108G (W.D. Pa., June 11, 1981), *appeal docketed*, No. 81-2223 (3d Cir. Aug. 10, 1981); *Dove v. Chattanooga*

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*Area Regional Transportation Authority*, Civ. A. No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed*, No. 81-5636 (6th Cir. Sep. 2, 1981); *Alewine v. City Council of Augusta, Georgia*, 505 F. Supp. 880 (S.D. Ga. 1981), *apeal docketed*, No. 81-7490 (5th Cir. June 5, 1981); *see contra, Joiner v. City of Macon*, Civ. A. No. 79-287-MAC (M.D. Ga. April 24, 1981), *request for permission to appeal filed* (5th Cir. June 14, 1981). The records developed in those cases will doubtless be particularly directed to considerations pertinent to mass transit and will present the appropriate vehicles for consideration of the application of the Tenth Amendment in that area.

We note, however, that it was the national government, not the State governments, which initiated the steps by which a stronger governmental role in the movement of masses of people in urban areas began to develop. Prior to the enactment of the Urban Mass Transportation Act in 1964, 49 U.S.C. §§ 1601, *et seq.*, city trolleys and buses were traditionally regarded as private sector business activities. See American Public Transit Association, *Transit Fact Book* (1978-1979, ed., at 55). Municipal ownership began at that time with heavy federal financial support, originally providing capital and later providing operating funds, subject to federal policies covering planning and manpower, including collective bargaining. The strong role of the federal government in this field has continued to this day. It is only in recent months that the federal-state roles in mass transit are undergoing re-examination by the Federal Department of Transportation. *See* 46 *Federal Register* 61531 (Dec. 17, 1981). Recent surveys indicate that federal withdrawal from its mid-century role in this respect may impair the States' ability to structure its operations in this area, the exact reverse of the *National League* criteria for immunity. *See New York Times*, Jan. 4, 1982.

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No. 80-1925

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION,
*Petitioner*,
v.
LONG ISLAND RAILROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the petitioner in this case.

## INTEREST OF THE AFL-CIO AND THE ISSUES TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

The AFL-CIO is a federation of 102 national and international unions with a total membership of 14,500,000 working men and women. The resolution of the question presented in this case concerning the scope of the rule

announced in *National League of Cities v. Usery*, 426 U.S. 833, will determine whether or not the members of the following affiliates of the AFL-CIO will continue to enjoy the right to bargain collectively protected by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*: the American Train Dispatchers Association; Brotherhood of Railway Carmen of the United States and Canda; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths and Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen & Oilers; and Sheet Metal Workers' International Association. The Federation and those affiliates representing employees under the RLA therefore have a major interest in the outcome.

The attached brief *amicus curiae* is devoted to showing: first, that the issue in this case is controlled not by the new rule of federalism stated in *National League*, as the court below ruled, but by the long-settled rule upholding application of the RLA to State-owned railroads stated by a unanimous Court in *California v. Taylor*, 353 U.S. 553, and expressly reaffirmed in *National League*, 426 U.S. at 854, n. 18; and, second, that if this case is to be decided on a balancing test, as the court below supposed, the federal interest is entitled to prevail. Finally, we venture beyond the confines of this case and of the settled law to show that the *National League* Court's Constitutional premise does not support its conclusion that employment relations in the range of services the States have traditionally offered their citizens are beyond the reach of the Commerce Power.

## CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

### ARGUMENT

**I. Under California v. Taylor, 353 U.S. 553, The Rights and Obligations of Employers Engaged In Common Carriage By Rail In Interstate Commerce and Their Employees Are Governed by the Railway Labor Act, Which Regulates and Protects the Right to Bargain Collectively.**

The Court of Appeals proceeded on the premise that the present case is governed by precedent in this Court.

In this, the Court of Appeals was right, but that court followed the wrong precedent. For the issue in this case is controlled not by the new rule of law stated in *National League of Cities v. Usery*, 426 U.S. 833, as the court below ruled, but by the long-settled rule stated by a unanimous Court in *California v. Taylor*, 353 U.S. 553, and expressly reaffirmed in *National League*, 426 U.S. at 854, n. 18.

A. *California v. Taylor* squarely holds that the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, applies to State-owned railroads and governs their relationship with their employees, notwithstanding contrary state laws (353 U.S. at 557-567); *Taylor* also expressly rejects California's submission "that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a State-owned railroad engaged in interstate commerce," (*id.* at 568).

In determining that State-owned railroads are covered by the RLA, the Court emphasized Congress' judgment that railroad labor relations are singular and should be regulated through the carefully balanced system Congress has devised:

> The Railway Labor Act is essentially an instrument of industry-wide government. See *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 749, 751 (dissenting opinion). The railroad world for which the Act was designed has been described as "a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established." Garrison, The National Railroad Adjustment Board; A Unique Administrative Agency, 46 Yale L.J. 567, 568-569 (1937). [353 U.S. at 565-566.]

The Court stressed the importance of uniformity in the Congressional scheme for railroad labor relations:

> The fact that the Act's application will supersede state civil service laws which conflict with its policy of promoting collective bargaining does not detract from the conclusion that Congress intended it to apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State. * * * Bargaining collectively * * * has often taken on a national flavor and agreements are uniformly negotiated for an entire railroad system. "[B]reakdowns in collective bargaining will typically affect a region or the entire nation." Lecht, Experience under Railway Labor Legislation (1955), 4. * * * Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force. [353 U.S. at 566-567, footnote omitted.]

And, the Court noted:

> [California's] civil service relationship is the antithesis of that established by collective bargained contracts throughout the railroad industry. "[E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions." *Order of Railroad Telegraphers v. Railway Express Agency, Inc., supra,* at 347. If the Federal Act applies to the Belt Railroad, then the policy of the State must give way. [353 U.S. at 560.]

So, too, New York State's Taylor law is the "antithesis" of the scheme of collective bargaining established by the RLA. For, the RLA creates special procedures for the negotiation of, and the mediation of disputes over, the

terms of collective agreements covering rates of pay, rules, and working conditions. And the RCA provides further that if these elaborate and deliberately drawn-out procedures fail to result in agreement, the parties are legally entitled to resort to the use of economic weapons, *viz.* the strike and lock-out. (See particularly, *Locomotive Engineers v. B. & O. R. Co.*, 372 U.S. 284, 291; *Railway Clerks v. Florida E.C.R. Co.*, 384 U.S. 238, 244; *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 380-381, 384-386, 392-393.)

B. The Court in *California v. Taylor* concluded by meeting and rejecting the State's constitutional claim:

> In *United States v. California*, *supra*, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government." 297 U.S. at 184. "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers . . . ." *Id.*, at 185. That principle is no less applicable here. If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships. See also, *California v. United States*, 320 U.S. at 577, 586; cf. *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 233-238 [353 U.S. at 568.]

C. The continuing validity of the constitutional holding just set out was expressly confirmed in *National League*, 426 U.S. at 854, n. 18:

> The holding of *United States v. California*, • • • is quite consistent with our holding today. There California's activity to which the congressional com-

mand was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce . . ." 297 U.S., at 182.

For the same reasons, despite Mr. Justice Brennan's claims to the contrary, the holdings in *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), and *California v. Taylor*, 353 U.S. 553 (1957), are likewise unimpaired by our decision today.

D. The Court of Appeals simply ignored that portion of *National League's* footnote 18 which denies that the holding of *California v. Taylor* is impaired.

That court did quote the first paragraph of that footnote, but dismissed it as "dictum." (634 F.2d at 26.) We suggest that the occasion must be rare indeed in which a lower court is free to disregard outright any portion of an opinion of this Court.[1] In any event, the Court of Appeals' "dictum" characterization is plainly incorrect. In the footnote in question the *National League* majority specifically addressed and rejected an objection raised by the dissenting opinion and deliberately stated the limits of its holding. Specifically, the Court made clear that the operation of railroads is outside the scope of "integral" governmental functions protected by the federalism principle declared in *National League*, thereby distinguishing those operations from those activities

[1] Such an approach might be proper where this Court itself describes a portion of its opinion as *"dictum"* (*See U.S. v. Barnett*, 376 U.S. 681, 695 n. 12 (continued)) or in some other manner indicates that while an issue is discussed its ultimate resolution is reserved. There may also be cases in which it is patent that part of the Court's opinion goes well beyond providing an authoritative answer to the questions presented. But, as we develop in the text, the Court of Appeals' treatment of *National League's* footnote 18 cannot be justified on either of these grounds.

which are so protected and from those whose status was left undecided.

Paradoxically the Court of Appeals chose to rely upon the *dissenting* opinion in *National League*. (634 F.2d at 26). Plainly, if Mr. Justice Brennan's reasoning in his *National League* dissent had prevailed it would be crystal clear that the RLA governs on the LIRR. And, as we have explained, the Court's opinion in *National League* expressly disavowed Justice Brennan's "claim" that the holding in *California v. Taylor* had been "impaired." The court below also noted that commentators "have questioned the rationale of excluding railroads from the protective core of governmental functions." (634 F.2d at 26). The single article cited in this connection declares: "Analyzed to the bottom, the [*National League*] decision proves insupportable except as it depends on a perception that 'states as states' under the Constitution are imbued with affirmative duties towards their citizens." (Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J., 1165, 1194.) At the outset Professor Michelman confesses that this interpretation of the decision "is a surprising one that leads in directions the Justices do not seem to have intended or anticipated." (*Id.* at 1166.) It is indefensible, we submit, for the court below to have taken as its guide to the meaning of *National League* not what was said in this Court's opinion, but a rejected portion of the dissenting opinion and one academician's effort to remake *National League* in his own ideological image.

E. It is sufficient for present purposes that the very decision on which the Court of Appeals based its conclusion disavowed any intent to disturb the constitutional holding of *California v. Taylor*. But, that court's rationale is further undermined by this Court's recent gloss on *National League* in *Hodel v. Virginia Surface Mining*

*and Reclamation Association*, —— U.S. ——, 49 L.W. 4654 (June 15, 1981):

> It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." *Id.* at 854. Second, the federal regulations must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.*, at 852. [49 L.W. at 4660].

The very point of *National League's* footnote 18 (which we quoted *supra* pp. 5-6) is that "common carriage by rail in interstate commerce" is *not* an "integral part of * * * governmental activity" and therefore does not meet the Second and Third of the *National League* requirements as explicated in *Virginia Surface Mining*.

In short, since *California v. Taylor* squarely holds that the RLA may constitutionally be applied to state-owned railroads, and thereby preempt contrary State laws, and since *National League* expressly preserves *Taylor* as a viable precedent, the court below was in error in holding that the RLA must give way to New York State's Taylor law.

**II. If a Balancing Test is to be Applied, the Federal Interests as Implemented in the Railway Labor Act Are Entitled to Prevail.**

A. The Court of Appeals applied a balancing test to determine whether the rights of the parties to this case should be governed by the federal Railway Labor Act or by New York State's Taylor law, and opined that the balance was in favor of the latter. (634 F.2d at 29-30.) However, *Virginia Surface Mining* makes clear that only

after it has been determined that the three threshold requirements of *National League* are met (see *supra* p. 7, quoting 49 L.W. at 4660), is there an occasion for balancing. As the *Virginia Surface Mining* Court stated in a footnote immediately after it spelled out those three requirements:

> Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies State submission. See *Fry v. United States*, 421 U.S. 542, reaffirmed in *National League of Cities v. Usery*, *supra*, at 852-853. See also *id.*, at 856, (Blackmun, J., concurring). [49 L.W. at 4660, n.29.]

We have shown in Part I, that under the authority of *California v. Taylor*, and footnote 18 of *National League*, respondents cannot satisfy either the second or the third of the *National League* requirements. That showing is, we believe, dispositive. Nonetheless, we show next, as a separate and independent ground for reversal, that here, as in *Fry*, *supra*, the federal interest "justifies State submission." The Court of Appeals erred at each step of its "balancing" analysis.

B. The Court of Appeals sought to minimize the conflict between the RLA and the Taylor law by observing that both have the same object: that court quoted from the RLA and from *California v. Taylor* (353 U.S. at 566) to establish the undeniable proposition that a primary purpose of the RLA is to avoid the interruption of interstate commerce; and stated that the "Taylor law's prohibition against strikes seeks to further that purpose, thereby helping the LIRR to maintain its status as a 'vital link' in the flow of interstate commerce." (634 F.2d at 19.) But this very argument was rejected by this Court in the very passage from which the Court

of Appeals quoted but a phrase. In *California v. Taylor*, the Court said:

> Congress has not only carved this singular industry out of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 182, but it has provided, by the Railway Labor Act, techniques peculiar to that industry. An extended period of congressional experimentation in the field of labor legislation resulted in the Railway Labor Act and produced its machinery for conciliation, mediation, arbitration and adjustments of disputes. A primary purpose of this machinery of railway government is "To avoid any interruption to commerce or to the operation of any carrier engaged therein . . . ." 48 Stat. 1186 (§ 2), 45 U.S.C. § 151a. See *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 242. Like the Safety Appliance Act, the Railway Labor Act is "all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U.S. 175, 186. *The fact that, under state law, the employees of the Belt Railroad may have no legal right to strike reduces, but does not eliminate, the possibility of a work stoppage. It was to meet such a possibility that the Act's "reign of law" was established.* A terminal railroad facility like the Belt Railroad is a vital link in the national transportation system. Its continuous operation is important to the national flow of commerce. [353 U.S. at 566; emphasis supplied.]

The court below also sought to distinguish the California statute, which *California v. Taylor* held to be the "antithesis" of the federal scheme (353 U.S. 559-560), from New York's Taylor law on the ground that "the state law involved here preserves the right of independent collective bargaining in several respects." (634 F.2d at 29.)[2] But like the California law, that of New York

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[2] The Court did not identify the respects in which collective bargaining is preserved by the Taylor law, but merely cited *SIRTOA v. International Bhd. of Electrical Workers*, 57 A.D.2d 614, 393

deprives the parties of the right to resort to economic weapons which Congress rightfully deems to be essential to collective bargaining over the terms of collective agreements between carriers on the one hand and their employees and unions on the other. As this Court noted in *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369:

> Both before and after enactment of the Railway Labor Act, as well as during congressional debates on the bill itself, proposals were advanced for replacing this final resort to economic warfare with compulsory arbitration and antistrike laws. But although Congress and the Executive have taken emergency *ad hoc* measures to compel the resolu-

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N.Y.S.2d 773, 775-76 (2d Dept.), *cert. denied*, 434 U.S. 934, which, while making the same point (57 A.D.2d at 616) likewise did not identify the aspects of collective bargaining which New York state law permits. But we need not pursue that point, since the state law undeniably prohibits the most essential element of collective bargaining as established by the RLA—a carefully developed scheme of negotiation and mediation from which both parties know that if these measures fail, either party is free to engage in economic self-help.

It bears mentioning, however, that the Appellate Division in *SIRTOA* acknowledged that the "operation of a railroad in interstate commerce is *not* an integral part of state governmental activities which are protected from congressional impairment by principles of state sovereignty." (Id. at 615, citing *National League*'s footnote 18). The basis of that court's decision was that the "connection between *SIRTOA* and interstate commerce is extremely tenuous". According to the Appellate Division that railroad is "not a vital link in the national transportation system, the continued operation of which is important to the national flow of commerce; and the instant labor dispute does not present problems of national or even regional magnitude, which problems would require uniform treatment on a national scale," (*id.* at 616). (But see *Brotherhood of Locomotive Engineers v. SIRTOA*, 100 LRRM 3154 (E.D.N.Y., 1979); *Brotherhood of Locomotive Engineers v. SIRTOA*, 360 I.C.C. 464 (1979).) In contrast, in this case, the court below appears to have acknowledged that the LIRR is a "vital link in the flow of interstate commerce." (634 F.2d at 29, quoted above).

> tion of particular controversies, no such general provisions have ever been enacted. [394 U.S. at 379-80, footnotes omitted]

Accordingly, "The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in *any* self-help." (*Id.* at 381, emphasis in original; see also *id.* at 384-385 and 392).

In sum, under the Railway Labor Act, as under the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.*, "collective bargaining, with the right to strike at its core, is the essence of the federal scheme" (*Bus Employees v. Missouri*, 374 U.S. 74, 82). Preservation of that right is not inconsistent with, but promotes the Congressional objective of avoiding interruptions of interstate commerce, an objective common to both the RLA and the NLRA. It should be sufficient that Congress has so determined in its major legislation governing the relationship between labor and management. But it may be useful to recall that this Court has articulated the theory underlying what may on the surface be a paradox —that industrial peace is furthered by establishing a system in which the potential of self-help by the parties underlies their negotiations. In *Railroad Trainmen*, Justice Harlan wrote:

> We think it clear, however, that the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes. The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a State would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary

to continue operating in the face of a strike. [394 U.S. at 380-381][3]

B. The court below determined that New York's interest in the regulation of the LIRR was greater than that of the federal government because 80 percent of the LIRR's revenue comes from its passenger operations and 20 percent from its carriage of freight. But this reasoning is entirely too simplistic.

To begin with, it is not clear why, if financial impact is at all relevant in determining the federal Government's interest, the LIRR's gross revenues should be the measure, rather than, for example, net revenues. And the lower court appears to have overlooked the fact that some of its passengers are using the LIRR as part of an interstate journey, to be continued on other carriers by other carriers, rail, air, or motor.

More fundamentally, the lower court's line of argument gives no weight to the point that the LIRR is part of a *single nationwide rail system* and that a central federal interest is the *uniform* regulation of that system, as this Court has repeatedly recognized. (See, for example, *California v. Taylor*, 353 U.S. at 567 (quoted *supra*, p. 3), and *Railroad Trainmen*, 394 U.S. at 380-381.) Removing the LIRR from the aegis of the RLA would itself undermine that uniformity, and the rationale of the decision below would also justify other exclusions and thereby transform the overall national scheme into a patchwork quilt of regulations.

C. In concluding its balancing discussion the court below said:

> In sum, we recognize that the LIRR would come under the literal terms of RLA, see *California v. Taylor, supra*, and that the right to strike, free from state interference, has been held essential to

[3] The same theory is more fully explained in *Labor Board v. Insurance Agents*, 361 U.S. 477, 489-490.

that federal scheme, *Bhd. of R. R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382-82, 89 S. Ct. 1109, 1115-1117, 22 L.Ed.2d 344 (1969). (634 F.2d at 30).

In fact, these considerations were not given the weight of a feather. Indeed, the court below quoted, as if it were conclusive, that portion of *National League* which declares its basic constitutional holding that the commerce power may not be exercised "so as to force directly upon the States [Congress'] choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." (634 F.2d at 30, quoting from 426 U.S. at 854-855). But that holding is not a part of the balancing process. Rather, as *Virginia Surface Mining* makes clear (see *supra* pp. 7-8), a determination that an integral governmental function is involved is a necessary but *not* a sufficient predicate for invalidating the choices made by Congress in the exercise of its commerce power. In other words, while the passage from *National League* quoted by the Court of Appeals is a critical portion of this Court's opinion, it is preliminary to, and is neither a part of, nor a substitute for, the balancing process which the Court of Appeals undertook. To put the States' sovereign interests into the scale at this later point of analysis is to misread *National League*. And it is to inevitably reach a result in favor of the State and against Congress because no weight is afforded to the interests of the national sovereign.

The lower court's felt necessity to ignore the national interest is readily understood. For that interest is at its zenith when it comes to the regulation of interstate transportation—and specifically, to relationships between carriers in commerce and their employees. And that overriding national interest requires that the balance be struck in favor of Congressional supremacy. As Justice Van Devanter wrote for a unanimous court in the *Second Employers' Liability Cases*, 223 U.S. 1:

Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act. [223 U.S. at 48.][4]

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[4] See also, *e.g.*, *Virginian Ry. v. Federation*, 300 U.S. 515, 553-557, where the Court sustained the constitutionality under the Commerce Clause of § 2 of the RLA, in a unanimous decision rendered just two weeks before the Court divided five to four over whether the Wagner Act was a valid exercise of the Commerce Power. Compare *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 29-32 with *id.* at 76-78.

### III. The Constitutional Principle Declared In National League of Cities v. Usery, 426 U.S. 833, Does Not Support the Broad Scope of Its Limitation on the Commerce Power.

For each of the reasons just stated in Parts I and II, the judgment below must be reversed as inconsistent with the law stated in *National League* and in *Virginia Surface Mining*. And, while it is not of present moment, it is, we believe, appropriate in a brief *amicus curiae* to conclude by addressing what, with all due deference, is a major void between the *National League* Court's constitutional premise on the one hand, and the list of state functions to which the Court stated the FLSA may not be constitutionally applied—"fire prevention, police protection, sanitation, public health, and parks and recreation" (426 U.S. at 851) and "schools and hospitals" (*id.* at 855)—on the other. We do so lest, without further consideration, this latter part of the *National League* decision be reiterated and thus take on added force.

The Constitutional principle *National League* declares is "that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution." (426 U.S. 842.) Those limits, said the Court, were marked out in earlier formulation such as the following: "The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States," (*Texas v. White*, 7 Wall. 700, 725 quoted at 426 U.S. at 844); and "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." (*Fry*, 421 U.S. at 547 n. 7 quoted at 426 U.S. at 843. See also *id.* at 842-844 quoting *Maryland v. Wirtz*, 392 U.S. 183, 196; *New*

*York v. United States*, 326 U.S. 572, 587-588; *Lane County v. Oregon*, 7 Wall. 71, 76; and *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523.) Then the Court provided the following explanation of why its premise required the invalidation of the FLSA amendments at issue:

> [T]he [FLSA] amendments * * * will * * * significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. * * * [T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. * * * We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, 8, cl. 3. [426 U.S. at 851-852.]

The precursors of *National League* noted by the Court there speak in carefully circumscribed terms: the "indestructible States" are not equated to separate sovereigns but are properly placed within an "indestructible Union." The pre-*National League* cases recognize that the nature of that Union and of the national sovereign bears inevitably on the nature of the States as "sovereignties." For, so far as is relevant here, that Union, formed in the Constitution, grants the Federal Government plenary power to regulate commerce and makes such regulations supreme. In contrast, *National League's* rationale does

not so much as mention the Union. The States are stated to be "sovereign governments" with a "freedom to structure integral operations in areas of traditional governmental functions," and the functions listed extend to the provision of such public services as "parks and recreation."

We have no doubt that there are powerful arguments for the proposition that a government that does not provide public parks, public recreation or public hospitals does not fulfill the requirements of a "good state" in the platonic sense of that term. Indeed, the list of public service areas in *National League* is the agenda for proper governmental action of the social reformers of the last hundred years.

But so far as the *National League* Court shows, or we are aware, there is nothing in the Constitution providing that the States must follow that agenda, that in order to foster that agenda the States are freed from otherwise applicable Federal requirements, or that large scale enterprises such as a public park, a public recreation area or a public hospital, the operation of which *in fact* affects commerce in the same fashion as a private park, a private recreation area, or a private hospital is to be deemed to be outside the Commerce power.

In short, there is no inevitable progression from the recognition that there are powers which "are essentially and peculiarly state powers" whose exercise the Federal Government may not impair—such as the power to "locate its own seat of government" and to "appropriate its own public funds for that purpose" (*Coyle v. Oklahoma*, 221 U.S. 559, 565, quoted in *National League*, 426 U.S. at 845)—to the proposition that the wide range of *proper* public services which the States have traditionally offered are part of the States' "freedom" as "sovereign governments".

This case is not, as we noted at the outset, the occasion to draw up the list of such "essentially and peculiarly

state powers." It is sufficient, we believe, to note that few, if any, services provided both by the public and private sector could find a place, and that the running of railroads that operate in interstate commerce is plainly not included as even *National League* recognizes.[8]

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[8] This is not to say that the provision of police or fire protection is not such a state power, even though in an attenuated sense there are private counterparts. For the role of the private policeman (guard) is different in kind from that of the public law enforcement officer; the former are charged with protection of the safety of the property and sometimes personnel of their employer, whereas the latter are charged with protecting the entire public. There is no such difference between a publicly-owned stadium and a private one or between a publicly-owned hospital and a private one.

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No. 80-1925

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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UNITED TRANSPORTATION UNION, *Petitioner*,

v.

LONG ISLAND RAILROAD COMPANY AND METROPOLITAN TRANSPORTATION AUTHORITY, *Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION AS *AMICUS CURIAE*

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## QUESTIONS PRESENTED

Is the freedom to determine whether public employees of states should have the right to strike an attribute of state sovereignty protected by the Tenth Amendment with which federal regulation may not interfere under our system of constitutional federalism?

If the answer is yes, is the ownership by the State of New York of the Long Island Rail Road passenger commuter transportation service a state activity typical of services states traditionally have afforded their citizens?

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## BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION AS *AMICUS CURIAE*

### INTEREST OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION

The American Public Transit Association (APTA) has received the written consent of petitioner and respondents to file a brief *amicus curiae* in support of respondents in this action. APTA is the national representative of most local publicly owned mass transit systems and the nationwide repository of information about local public transit. Local publicly owned mass transit systems today provide more than ninety percent of all mass transit rides in the United States. APTA has a significant interest in this case because it may affect the states' ability to structure relationships with their public transportation employees and because it presents legal issues closely related to issues being litigated in several federal courts in which APTA or its members are parties.

This Court decided in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that, under the Tenth Amendment to the Constitution of the United States and our system of federalism, a federal statute cannot be applied to certain functions of state and local governments where that statute would displace a state's ability to structure relationships with its employees. Therefore this Court held that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 206, 207 (1976), cannot constitutionally be applied to such integral operations of certain state and local governmental functions. The resolution of the lower court cases in which APTA or its members are parties turns on whether local publicly owned mass transit systems fulfill such governmental functions, typical of services states traditionally have provided their citizens. All the lower courts that have ruled on the issue, except for a single federal district court, have found that local public transit systems are traditional and integral governmental functions, typical of the essential public services provided by state and local governments around the country. These courts therefore have held that the minimum wage and maximum hour provisions of the FLSA cannot be applied to public transit employees.[1]

In disposing of the case at bar, this Court must consider whether the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1976), if applied to state employees, would "operate to

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[1] *E.g.*, *Dove* v. *Chattanooga Area Regional Transportation Authority*, Civ. A. No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed*, No. 81-5636 (6th Cir. Sept. 2, 1981); *Kramer* v. *New Castle Area Transit Authority*, Civ. A. No. 80-1008G (W.D. Pa. June 11, 1981), *appeal docketed*, No. 81-2223 (3d Cir. Aug. 10, 1981); *Alewine* v. *City Council of Augusta, Georgia*, 505 F. Supp. 880 (S.D. Ga. 1981), *appeal docketed*, No. 81-7490 (11th Cir. June 5, 1981); *Francis* v. *City of Tallahassee*, Case No. 79-446 (2d Cir. Fla. Dec. 8, 1980); *contra Joiner* v. *City of Macon*, Civ. A. No. 79-287-MAC (M.D. Ga. April 24, 1981), *appeal docketed*, No. 81-7789 (11th Cir. June 14, 1981).

directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," *National League of Cities*, 426 U.S. at 852. If this Court concludes that the federal strike procedures required by the Railway Labor Act do displace New York State's ability to structure certain elements of its employee relations, an essential attribute of state sovereignty, this Court then must examine the nature of the Long Island Rail Road (LIRR). It must determine whether the publicly owned LIRR, an integral part of the Metropolitan Transit Authority's (MTA) system of intrastate commuter passenger service, fulfills a public service function integral to and typical of state government, as do local public mass transit systems throughout the nation.

Like respondents, APTA's members provide local public transportation. Many local public transit systems consist of a mix of various forms of transportation suited to the local needs, including buses, subways, trolleys and commuter rail. American Public Transit Association, *Transit Fact Book* at 14 (1979) (Transit Fact Book).[2] Thus APTA is uniquely suited to provide the Court with an understanding of the nature of local public mass transit and of the possible implications of this decision for the ability of state and local governments throughout the country to structure their relationships with public transit employees and to finance and maintain these essential public services during a period of fiscal stringency.

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[2] The Transit Fact Book is based on surveys by APTA of transit systems throughout the country and information made public by agencies such as the United States Bureau of the Census, the Department of Transportation and the Department of Labor. The Transit Fact Book is the primary source of information about the transit industry in the United States and is generally used and relied upon by persons employed in any field relating to mass transit. Petitioner, respondents and the government all have cited the Transit Fact Book in their briefs as a source of information about the industry.

## SUMMARY OF ARGUMENT

The questions presented by this case arise at the intersection of two diverse trends in constitutional doctrine. In recent years, this Court has recognized an expanding reach of Congress' Commerce Clause power. This Court also has developed our understanding of our system of federalism as reflected in the Tenth Amendment and has extended the protection afforded state and local governments from the exercise of federal power. *Compare Wickard* v. *Filburn*, 317 U.S. 111, 118-129 (1942), *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (1942), *United States* v. *Darby*, 312 U.S. 100, 112-124 (1941), *and NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34-41 (1937), *with National League of Cities* v. *Usery*, 426 U.S. 833 (1976). When these constitutional interests conflict, this Court has held that the Tenth Amendment may limit the reach of Congress' Commerce Clause powers when applied to the activities of state and local government.

*National League of Cities* held that Congress may not regulate the states in such a fashion as to displace their ability to structure integral operations of functions typical of those traditionally performed by state and local governments. This Court concluded, as a matter of law, that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act (FLSA) would "impermissibly interfere" with the fundamental right of states to regulate employee relations. 426 U.S. at 851. It therefore held that under the Tenth Amendment and the system of federalism inherent in our Constitution, the FLSA could not be applied to "almost all public employees employed by the States and by their various political subdivisions." *Id.* at 836. To allow otherwise "would impair the States' 'ability to function effectively in a federal system.' " *Id.* at 852 (citation omitted). Lower federal courts have almost uniformly held that the FLSA minimum wage and overtime provisions cannot be applied to state transit employees because local public mass transit is an

integral and traditional state function within the protection of the Tenth Amendment.

Likewise, the Railway Labor Act cannot constitutionally be applied to the state employees of the LIRR, an integral part of the public transit system owned by the MTA, an agency of the State of New York. The freedom to prohibit state employees from striking, as codified in New York's Taylor Law, N.Y. Civ. Serv. Law §§ 200 *et seq.* (McKinney 1973 & Supp. 1980), is a power essential to state sovereignty. The federal Railway Labor Act, in direct conflict with the New York Taylor Law, creates for covered employees a right to strike and establishes federal strike mediation procedures. This Court held in *National League of Cities* that a fundamental determination relating to the structuring of employer-employee relationships is an essential "attribute of state sovereignty," *National League of Cities*, 426 U.S. at 845, with which the federal government may not interfere. The determination of whether state employees should have a right to strike and how potential strikes should be mediated is a critical element of state labor relations, and as such is fundamental to the state's ability to structure employer-employee relationships. Thus, consistent with *National League of Cities*, the Railway Labor Act may not be applied to a state function that is typical of those traditionally performed by state governments.

In his opinion concurring in the plurality decision in *National League of Cities*, Justice Blackmun stated that "it seems to me that [the Court] adopts a balancing approach." 426 U.S. at 856. If a balancing test was applied in *National League of Cities*, it is apparent that the Court found that the state interest in structuring employee relations outweighed the federal interest in labor relations. *Id.* at 851-852. Indeed, by this holding the Court in *National League of Cities* essentially has already struck the balance in favor of the state interest regarding the issues at hand. The state interest in determining whether public employees performing an integral state function should have the right

to strike in the event of labor disputes, and the ensuing impact on the community from disruption of important public services that such a strike might cause, clearly outweighs the federal interest expressed in the Railway Labor Act to establish uniform labor relations, rights and procedures for the interstate railroads.

The primary and almost exclusive activity of the LIRR is provision of local public commuter mass transit service, a service that today is an activity typical of the services state and local governments have provided their citizens. It is as essential and integral to the government's public responsibility in the community it serves as are "fire prevention, police protection, sanitation, public health, and parks and recreation," 426 U.S. at 851, and schools and hospitals, *id.* at 855, which this Court has held are "typical" examples of those "activities which are well within the area of traditional operations of state and local governments." *Id.* at 851, 851 n.16. Today states are called upon to provide local mass transit commuter services because of community need. Local public mass transit, including commuter rail service, should be afforded the protection of the Tenth Amendment because it provides a service to the community at-large that cannot be provided profitably by private parties and that state and local governments typically regard as necessary to the health and welfare of their citizens. In this case, the state has elected to provide these services by railroad. The service performed is what is of constitutional significance, not the means selected by the state to perform that service.

For these reasons, analogies drawn by petitioner and the government to *United States* v. *California*, 297 U.S. 175 (1936), and other decisions involving a state-owned freight railroad would have this Court place form over substance. Nevertheless, should this Court determine that the LIRR is subject to the Railway Labor Act because of its *de minimis* connection with interstate freight railroads, this Court should avoid sweeping within its decision local public mass transit. The latter service does not share any of the char-

acteristics of commercial railroads such as freight carriage or federal regulation as a common carrier; local public mass transit is clearly the type of function performed by state and local government today as an essential public service.

## ARGUMENT

### THE RAILWAY LABOR ACT WHICH ALLOWS COVERED EMPLOYEES TO STRIKE MAY NOT BE APPLIED TO THE PUBLIC EMPLOYEES OF THE LONG ISLAND RAIL ROAD UNDER THE DOCTRINE OF *NATIONAL LEAGUE OF CITIES* v. *USERY*

In *National League of Cities*, 426 U.S. at 840, this Court restated the commonly accepted rule of law that "the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress." The Court recognized, however, that the Commerce Clause, like other clauses in the Constitution, may be restricted by other constitutional provisions. Thus the issue in *National League of Cities*, and the issue in this case, is whether Congress' attempt under the Commerce Clause "to regulate directly the activities of States as public employers," *id.* at 841, violates the Tenth Amendment and our system of federalism because it displaces an "attribute[] of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." *Id.* at 845.

As correctly stated by the United States in its brief *amicus curiae*, this Court in *National League of Cities* held that "the 1974 amendments to the Fair Labor Standards Act (FLSA) applying the minimum wage, overtime pay and maximum hour provisions of that Act to 'almost all public employees employed by the States and by their various political subdivisions' (*id.* at 836) were unconstitutional." Brief for the United States as *Amicus Curiae* at 13.

The Court expressly found that "the wages which shall be paid to those whom [the States] employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime," 426 U.S. at 845, are "undoubted attributes of state sovereignty," *id.*, which could not be displaced by Congress. Application of these FLSA requirements "displaces state policies regarding the manner in which [the States] will structure delivery of those governmental services which their citizens require." *Id.* at 847.

> [L]ike the minimum wage provisions, the vice of the [overtime provisions of the] Act as sought to be applied here is that [they] directly penalize[] the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose.
>
> This Congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs.

*Id.* at 849. Indeed, the rationale underlying the decision in *National League of Cities* applies with equal force to the issue before the Court today. This Court stated:

> If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."

*Id.* at 851, *quoting Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911). The Court thus concluded that "the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," *id.* at 852, and therefore cannot be applied in keeping with the Tenth Amendment and our system of federalism.

This Court set forth concisely in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 101 S. Ct. 2352, 2366 (1981), the considerations that determine whether a federal statute may be applied to a state activity:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854, 96 S. Ct., at 2475. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.*, at 845, 96 S. Ct., at 2471. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.*, at 852, 96 S. Ct., at 2472.

The statute involved here must thus be scrutinized under each of these criteria. The Railway Labor Act, by permitting strikes and establishing strike mediation procedures, attempts to impose a structure in a most critical area of employer-employee relationships. As applied to a state agency, such as the LIRR, the Act directly conflicts with the no-strike policy for such state employees contained in the New York Taylor Law, and it directly displaces the state policies governing employee relations—an essential attribute of state sovereignty. Compliance by the LIRR with the Railway Labor Act would impair the state's ability to structure employee relations "within the area of traditional operations of state and local governments." *National League of Cities*, 426 U.S. at 851 n.16.

### A. Application Of The Railway Labor Act To The State Employees Of The Long Island Rail Road Constitutes Regulation Of The State Qua State

Respondent LIRR is a wholly owned subsidiary of respondent MTA, an agency of the State of New York. It is beyond dispute that application of the Railway Labor Act

to respondents would constitute an "exercise of congressional authority directed, not to private citizens, but to the States as States." *National League of Cities*, 426 U.S. at 845. It is the state agency's ability to structure employer-employee relationships, in particular to prohibit strikes, that is regulated by the federal statute involved.

This is in sharp contrast to the statute that withstood Tenth Amendment attack in *Hodel*. In that case, this Court upheld a challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977, which established a regulatory program for private surface coal mining operations through joint federal and state regulation. In so doing, the Court emphasized that "the steep-slope provisions of the Surface Mining Act govern only the activities of coal mine operators who are private individuals and businesses. Moreover, the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." 101 S. Ct. at 2366. On the contrary, the application of the Railway Labor Act here is comparable to the application of the FLSA provisions at issue in *National League of Cities*. In *Hodel*, the Court clearly distinguished *National League of Cities* on the grounds that there the FLSA provisions "pre-empt express state-law determinations" regarding "the wages and work hours of state employees," *id.* at 2365, *quoting National League of Cities*, 426 U.S. at 840. Similarly, the Railway Labor Act pre-empts the New York State law determination that state employees, including employees of the LIRR, may not strike.

Petitioner's argument, Brief for the Petitioner at 19, that "[t]he Railway Labor Act does not regulate the States 'as States'; it regulates interstate railroads, however owned," does not alter the conclusion that the Act, if applied to the employees of the LIRR, is regulation of the state qua state. It can be applied to LIRR employees only if this Court concludes that Congress intended to cover

state employees. It is irrelevant that the state agency is included in the regulatory ambit as part of a larger class that includes private parties as well. The same can be said of the FLSA, since most covered employees under that Act work for private persons and businesses. This Court nevertheless concluded in *National League of Cities*, 426 U.S. at 854, that the FLSA as applied to state employees was a regulation of states as states. *See also Hodel*, 101 S. Ct. at 2365-2366.

### B. The Determination Of Whether Or Under What Conditions State Public Employees May Strike Is An Element Of State Employee Relations Of The Type That This Court Has Held Is An Attribute Of State Sovereignty

1. *National League of Cities* established that the determination of wages, hours and overtime compensation for public employees is an "undoubted attribute of state sovereignty." 426 U.S. at 845. This Court reasoned that there would be little left of state sovereignty if "application [of the federal law] will . . . significantly alter or displace the States' abilities to structure employer-employee relationships," *id.* at 851.

The Court cited numerous examples of the ways in which federal regulation of wages and hours for state employees would "displace[] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." *Id.* at 847. Federal wage and hour requirements, for example, would increase costs, would eliminate state flexibility to hire those with little training at a lower salary or to use volunteer labor, and would require the states "to structure work periods in some employment areas, such as police and fire protection, in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation." *Id.* at 846-851.

In *National League of Cities*, the "undoubted attribute of state sovereignty," *id.* at 845, to which this Court re-

ferred was the state's power over wages, hours and overtime—essential elements in structuring employee relations. The United States and petitioner are therefore flatly wrong in positing that the issue before this Court is whether the "[o]peration of a railroad" is an essential attribute of state sovereignty with which the federal government may not interfere. Brief for the United States as *Amicus Curiae* at 15. *See also* Brief for the Petitioner at 37-38. Rather, the threshold question before this Court is whether the state's power to determine whether its employees have the right to strike—a crucial element of state employee relations—is an attribute of state sovereignty. The effect of strikes and the power to strike on employee relations is so significant that this Court must conclude that such a determination is as essential an attribute of state sovereignty as is setting the wages, hours and overtime compensation for its employees.[3]

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[3] A holding for the respondents would not affect the numerous lower court decisions finding *National League of Cities* inapplicable to federal statutes other than the Railway Labor Act or the Fair Labor Standards Act.

Some of these decisions have upheld federal statutes on constitutional grounds other than the Commerce Clause; *National League of Cities* did not resolve whether the Tenth Amendment limits other constitutional provisions. 426 U.S. at 852 n.17. Relying in part on *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), lower courts have found that the Tenth Amendment and federalism limitations articulated in *National League of Cities* are not applicable to statutes grounded in certain other constitutional powers. For example, some courts have found that the Equal Pay Act is authorized by Section 5 of the Fourteenth Amendment. *E.g.*, *Marshall* v. *Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978); *Usery* v. *Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977); *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977). Similarly, in *Arritt* v. *Grisell*, 567 F.2d 1267 (4th Cir. 1977), the court relied on the Fourteenth Amendment to uphold the applicability to state and local governments of the Age Discrimination in Employment Act

As the court below found, "the freedom to strike affects the collective bargaining process and could result in re-

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of 1976. Like reasoning has been used in upholding application of the Veterans' Reemployment Rights Act to state and local governments as an exercise of the war power. *Peel* v. *Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979). *Cf. National League of Cities*, 426 U.S. at 854 n.18.

Other lower courts have upheld the application of certain federal statutes to state and local governments as valid exercises of the Commerce Clause despite Tenth Amendment challenges based on *National League of Cities*. *E.g.*, *Pearce* v. *Wichita County*, 590 F.2d 128 (5th Cir. 1979) (Equal Pay Act); *Marshall* v. *City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978) (Equal Pay Act); *Friends of the Earth* v. *Carey*, 552 F.2d 25 (2nd Cir.), *cert. denied*, 434 U.S. 902 (1977) (Clean Air Act Amendments of 1970). These decisions involve fundamentally different federal statutes and state policies. Thus, the nature of the federal interference under, for example, the Equal Pay and Clean Air Acts with the state or local government's ability to structure the delivery of governmental services is wholly different from the displacement of the state's ability to structure employee relations resulting from application of the Railway Labor Act or the wage and hour provisions of the FLSA. This court reaffirmed in *National League of Cities* the holding in *Fry* v. *United States*, 421 U.S. 542 (1975), that the Economic Stabilization Act "was constitutional as applied to temporarily freeze the wages of state and local employees." 426 U.S. at 852. It distinguished the statute in *Fry* from the wage and hour provisions of the FLSA because the former "merely required that the wage scales and employment relationships which the *States themselves had chosen* be maintained during the period of the emergency." *Id.* at 853 (emphasis added). Similar reasoning was applied in *Friends of the Earth*, where the court specifically found that "the State's freedom *to choose and formulate its own policy* concerning crucial local issues was preserved by and written directly into the Clean Air Act Amendments of 1970." 552 F.2d at 38 (emphasis added). Courts examining the Equal Pay Act as authorized by the Commerce Clause have made comparable findings. For example, in *Pearce*, it was found that the Equal Pay Act "leaves the states free to set all substantive terms of employment"

quiring the State to pay higher wages in order to avert the devastating economic injury that a halt in the commuter transportation system would cause." 634 F.2d at 25.[4] Indeed, in ruling in *Maryland* v. *Wirtz*, 392 U.S. 183, 195 (1968), on the application of the wage and hour provisions of the FLSA to state hospitals and schools, this Court recognized that strikes are an element of "labor conditions" very much related to the determination of wages and hours. The holding of *Wirtz* was reversed in *National League of Cities*, but this characterization of strikes and work stoppages as an element of the category in which this Court has placed wages and overtime—*viz.*, labor conditions—survives. Therefore, determination of whether the public employees of a state agency have the right to strike is an "undoubted attribute of state sovereignty." 426 U.S. at 845.

2. Petitioner argues that the Railway Labor Act establishes a procedure for negotiation by a state with its employees but does not impose substantive requirements on the state such as mandating any particular terms of employee compensation. Brief for the Petitioner at 43. The effect of a strike by public employees providing an important service to the community at-large is so significant that the existence of a right to strike has a substantive effect on the freedom of the state as employer to negotiate the terms of employment necessary to ensure continued operation of state governmental services. Furthermore, petitioner speaks of the state employees' "ultimate" "right

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and requires only that the substantive terms of employment not be determined arbitrarily or in a discriminatory fashion. 590 F.2d at 132. The statute at issue here, however, does not leave the state free to determine whether its public employees should have the right to strike.

[4] The opinion of the court of appeals is reprinted as Appendix A to the Petition for Certiorari.

to strike," *see, e.g., id.* at 45;[5] a right is by its very definition a matter of substance.

President Reagan recently demonstrated that the determination of whether public employees should be allowed to strike is a fundamental aspect of governmental sovereignty. In his response to an allegedly illegal strike by members of the Professional Air Traffic Controllers Organization union—employees of the federal government—the President articulated the importance of the government-employer's retaining control over whether its employees may strike:

> [W]e cannot compare labor-management relations in the private sector with government. Government cannot close down the assembly line. It has to provide without interruption the protective services which are government's reason for being.

Statement to the Press, 17 Weekly Comp. of Pres. Doc. 845 (Aug. 10, 1981). President Reagan shortly thereafter reaffirmed that "[p]ublic employees cannot strike against the public." Remarks at a Target '82 Republican Fundraising Reception, 17 Weekly Comp. of Pres. Doc. 904 (Aug. 31, 1981).

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[5] Federal employees are prohibited by law from asserting a right to strike against the federal government. 5 U.S.C. § 7311(3) (1976); 18 U.S.C. § 1918 (1976). It is clear that both state and federal governments have the power to prevent their employees from striking. *See, e.g., Bennett* v. *Gravelle*, 451 F.2d 1011, 1012 (4th Cir. 1971); *Olshock* v. *Village of Skokie*, 401 F. Supp. 1219, 1220 (N.D. Ill. 1975); *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971); *City of New York* v. *DeLury*, 23 N.Y.2d 175, 295 N.Y.S.2d 901, 243 N.E.2d 128 (1968), *appeal dismissed*, 394 U.S. 455 (1969).

### C. The Provision Of Commuter Transportation Services Is A State Activity Typical Of Services States Traditionally Have Afforded Their Citizens

*National League of Cities* held that federal law which displaces an attribute of state sovereignty may not be applied to state "activities [that] are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. "Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens." *Id.* This Court also referred interchangeably to these functions as "integral governmental functions," *id.* at 855, "important governmental activities," *id.* at 847, "governmental services which their citizens require," *id.*, "an area that the States have regarded as integral parts of their governmental activities," *id.* at 854 n.18, and "integral operations of state governments," *id.* at 852 n.17.

Provision of commuter rail service as a part of an integrated local public transit system is the type of activity typically performed today by state and local governments around the country in providing important public services to the community at-large. State and local governments exist to provide services that aid the public health and welfare and that should be available to all sectors of the community regardless of their profitability. Indeed, local public commuter mass transportation services are so similar to the functions this Court has found worthy of protection that the doctrine of *National League of Cities* encompasses such services.

*National League of Cities* noted as examples of protected activities "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. In overruling *Wirtz*, schools and hospitals were included as

well. *Id.* at 855. These examples were merely a listing of a few of the most obvious of the activities that state and local governments typically consider their responsibility to provide. This Court expressly emphasized the breadth of its decision:

> These examples are obviously not an exhaustive catalogue of the *numerous* line and support activities which are well within the area of traditional operations of state and local governments.

*Id.* at 851 n.16 (emphasis added).

*National League of Cities* also preserved this Court's holding in *United States* v. *California*, 297 U.S. 175 (1936), that the federal Safety Appliance Act requirements for coupling devices on interstate railroad cars may be applied to the State Belt Railroad. 426 U.S. at 854 n.18. *United States* v. *California*, however, is in no way controlling here.[8] There the railroad served only industrial plants on San Francisco Harbor and "[t]he larger part of this traffic has its origin or destination in states other than California." 297 U.S. at 181. This Court in *National League of Cities* distinguished state-operated freight railroads from activities "typical of those performed by state and local governments," 426 U.S. at 851, because "[t]here California's activity to which the congressional command was directed was not in an area that the *States have regarded* as integral parts of their governmental activities." *Id.* at 854 n.18 (emphasis added). It was, on the contrary, the operation of a railroad engaged in " 'common carriage by rail in interstate commerce. . . .' " *Id., quoting United States* v. *California*, 297 U.S. at 182. Moreover, in narrowing this hold-

[8] Clearly whether a state-owned railroad must use a coupling device on freight cars engaged in interstate commerce is not a determination that is an essential attribute of state sovereignty, unlike a determination as to whether state public employees should have the right to strike.

ing, this Court expressly rejected the following "dicta from *United States* v. *California*," 426 U.S. at 854-855:

> "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

*Id.* at 854, *quoting Maryland* v. *Wirtz*, 392 U.S. at 198, *quoting United States* v. *California*, 297 U.S. at 185.

Petitioner's emphasis on facts concerning past regulation of the LIRR as a railroad common carrier begs the question presented. The LIRR is the means selected by the State of New York to provide commuter transportation services to its citizens. It is this provision of commuter transportation that is an activity "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. In *United States* v. *California*, the activity in which the state was engaged was the hauling of freight in interstate commerce and the means selected was by railroad. Neither respondents nor APTA argues that the hauling of freight is an activity typical of the kinds of activities the states have traditionally provided their citizens.

It is for this reason that *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), and *California* v. *Taylor*, 353 U.S. 553 (1957), also are clearly distinguishable from the case at bar. *Parden* held that a state may not assert sovereign immunity in a personal injury action brought by an employee of a state-operated freight railroad. *Taylor* again involved the State Belt Railroad and held that the Railway Labor Act may be applied to its activities. In both these cases, as in *United States* v. *California*, it cannot be said that engaging in the hauling of freight by rail is "an area that

the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 n.18. The provision of commuter mass transportation services, on the other hand, is an activity in which state and local governments have typically engaged "in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851.

Furthermore, *Parden*, *Taylor* and *United States* v. *California* should be read narrowly because they were decided before *Wirtz* was overruled and at a time when this Court believed that Congress' exercise of Commerce Clause power was no more limited in its application to state activities than it was when used to reach private activities. *Cf. Fry* v. *United States*, 421 U.S. 542, 551 (1975) (Rehnquist, J., dissenting). After *National League of Cities*, this is no longer the law.

In determining whether commuter mass transportation services are functions typically provided by the states, this Court should follow the dictate of *National League of Cities* and give substantial weight to the judgment of state and local governments. 426 U.S. at 854 n.18. In calendar year 1978, there were 463 transit systems owned by state or local governmental agencies. Transit Fact Book at 38. These included 102 of the 106 metropolitan areas in the country with a population over 200,000. Urban Mass Transportation Administration, U.S. Department of Transportation, *Public Transportation Service* (1979). These public systems are used primarily for home-to-work commuter transportation.[7]

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[7] Usage of local mass transit increases dramatically during commuting hours, while the automobile is preferred for discretionary social and recreational travel on evenings and weekends. 109 Cong. Rec. S 207 (daily ed. Jan. 14, 1963) (remarks of Sen. H. Williams); W. Owen, *The Metropolitan Transportation Problem* at 211 (rev. ed. 1966). At least one-half of the downtown workforce in several major urban centers depends upon transit to reach the workplace. *Transit Assistance Act of 1981: Hearings on S. 1160 Before the*

If such a substantial number of state and local governments have determined that they must provide publicly owned commuter transportation services, particularly in urban areas, this function must be considered an activity typical of those states have traditionally afforded their citizens and therefore entitled to protection under the doctrine of *National League of Cities.*[8]

The State of New York should not be penalized for determining that the most efficient means of providing commuter transportation services to its citizens is via railroad. The patterns of living and working in the New York City metropolitan area require that many commuters travel a long distance to their place of work. The infrastructure for

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*Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 87 (1981) (statement of K. Slapin on behalf of the National League of Cities); *id.* at 97 (statement of L. Ronis, President of the American Public Transit Association).

[8] Examples of state laws decreeing public mass transit to be an important function of government are considered in *Inman Park Restoration, Inc.* v. *Urban Mass Transportation Administration*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd sub nom. Save Our Sycamore* v. *Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573 (5th Cir. 1978) (quoting an amendment to the state constitution providing that public transportation is an "essential governmental function"); *Henderson* v. *Metropolitan Atlanta Rapid Transit Authority*, 225 S.E.2d 424, 427 (Ga. 1976) (same); *Mass Transit Administration* v. *Baltimore County Revenue Authority*, 298 A.2d 413, 415 (Md. Ct. App. 1973) (quoting a Maryland statute that the Metropolitan Transit Authority is performing "an essential governmental function"); *Teamsters Local Union No. 676* v. *Port Authority Transit Corp.*, 261 A.2d 713, 716 (N.J. Sup. 1970) (same—New Jersey statute); *County of Niagara* v. *Levitt*, 411 N.Y.S.2d 810, 812 (Sup. Ct. 1978), *modified*, 428 N.Y.S.2d 675, 406 N.E.2d 490 (Ct. App. 1980) (same—New York statute); *Pennsylvania* v. *Erie Metropolitan Transit Authority*, 281 A.2d 882, 885 (Pa. 1971) (same—Pennsylvania statute).

the LIRR was in place. Certainly this Court would not require a state desiring to maintain flexibility in its operation of commuter transportation services to forego purchasing a commuter railroad that the private sector could no longer afford to operate profitably, such as the LIRR, and instead require the state to purchase buses or install trolley cars so as to provide a service necessary to the health and well-being of its citizens.

Thus this Court should not evaluate commuter trains in isolation, but rather it should consider them as an integral part of local urban mass transportation systems throughout the United States. As urban areas have become more congested, the need for public mass transit systems has evolved.[9] The responsibilities of state and local governments as well as the federal government have had to evolve and expand in order to continue to provide the kinds of services citizens have typically expected from government—those services generally available to the community at-large which promote a civilized and healthy life. It was recognized in *New York* v. *United States*, 326 U.S. 572, 579 (1946) (Opinion of Frankfurter, J.), that "a static concept of government denies its essential nature."[10] As the needs

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[9] In enacting the Urban Mass Transportation Act of 1964, Congress found that "the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas" and that "the satisfactory movement of people and goods within such areas . . . are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services." 49 U.S.C. § 1601 (1976).

[10] *See also Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), where the court interpreted the definition in *National League of Cities* to "suggest[] that the terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times." *Id.* at 1037. In holding that the operation of a municipally-owned airport is an integral governmental function

of state citizens have evolved, state and local governments have had to alter the activities in which they engage in performing their traditional functions of providing for the public health and welfare.[11] *Cf. Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 75 (1978). At the same time, as Chief Justice Burger noted in *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 421 n.2 (1978) "[o]ur conceptions of the limits imposed by federalism are bound to evolve, just as our understanding of Congress' power under the Commerce Clause has evolved."[12]

In 1966, through acquisition of the LIRR, the State of New York entered into the activity of providing commuter transportation services. While public ownership of local transit began around the turn of the century, it became pervasive over the past twenty years as private companies increasingly found it impossible to provide service without incurring significant losses. Transit Fact Book at 55. By acquiring the LIRR, the State of New York did not elect

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within the meaning of *National League of Cities*, the court in *Amersbach* stated:

> We would have difficulty in concluding that, in the economy of the present day, the maintenance of a municipal airport is not an integral function of government.

*Id.* at 1038. *See also* opinion of the court below. 634 F.2d 19, 26 (2d Cir. 1981).

[11] According to W. Owen, *The Metropolitan Transportation Problem* 4-5 (rev. ed. 1966), "[t]oday nine-tenths of the mounting expenses of city governments are for services that did not exist at the turn of the century—traffic engineering, airports, parking facilities, health clinics and a long list of others."

[12] The Tenth Amendment and our system of federalism do not require that all state activities be protected from federal intrusion. This Court need not consider whether competition by states in profitable business activities or provision of services to a discrete group of commercial users is protected.

to enter "an industry that has been comprehensively regulated by the United States for nearly a century." Brief for the United States as *Amicus Curiae* at 22. Instead, it assumed a service necessary to the community at-large that could not be provided by the private sector without substantial economic losses and which was destined to be abandoned. The court below found that if the state had not taken over this function, it would have gone unprovided. "The substantial state and local funds used to subsidize the [LIRR] attest to the fact that no private businessman would dare undertake the venture." 634 F.2d at 28 (footnote omitted). This was similar to the nationwide situation at that time in history. Changing demographic patterns, rising costs of labor and equipment, the deterioration of inner city areas, increasing demand for low fare service to the elderly, the handicapped and students, and emerging problems of air pollution, energy dependency and traffic congestion all converged to increase significantly the public demands made on local transit systems while, at the same time, making it economically impossible for private entities to continue to respond to this demand. *See, e.g.,* Transit Fact Book at 46-48. Public ownership became inevitable as state and local governments throughout the country determined that they could not allow their citizens to be without such services.[13]

States and their political subdivisions are the principal providers of mass transit services. Transit Fact Book at 55. About ninety percent of transit revenues, total transit

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[13] Congress has found that "for many years the mass transportation industry satisfied the transportation needs of the urban areas of the country capably and profitably . . . [but that] in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service." 49 U.S.C. § 1601b (1976).

miles, and linked passenger trips [14] are attributable to publicly owned mass transit systems. *Id.* at 38-39. Heavily subsidized by general and special tax revenues, local public transit systems maintain low fares to serve the transportation needs of the entire community. *Id.* at 19, 46-48, 56. Organizationally, local public transit systems are often managed by departments of city government and are integrated or closely coordinated with other essential governmental services and departments. *Id.* at 55-56. In addition, public transit serves the overall interest of the community, *inter alia*, by reducing traffic congestion, promoting rational land use, revitalizing inner-city areas, facilitating employment, conserving energy, and preventing pollution. *Id.* at 50-54; 59-62.

Meeting this changing public demand has required substantial financial support from general tax revenues. Federal assistance contributes only fifteen percent of the operating costs of local public transit systems. State and local governments provide about a third of operating costs. *Id.* at 19. Moreover, current federal policy favors phasing out federal operating assistance and requiring state and local governments to assume the total responsibility for operating costs. Office of the Press Secretary, The White House, *President's Budget Reform Plan* at 4-28 (1981); *Transit Assistance Act of 1981: Hearings on S.1160 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 3 (1981) (Statement of D. Lewis, Secretary, U.S. Department of Transportation); N.Y. Times, May 10, 1981, at E5.[15]

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[14] Linked passenger trips includes trips taken by initial-board (originating) transit patrons and excludes all transfer and charter rides. It includes patrons paying full fare, reduced fare, or no fare. Transit Fact Book at 8.

[15] Furthermore, the federal government has recently recognized the preeminence of the state interest in determining the terms on

Thus, local public transit systems are—and will continue to be—an important local public service for which state and local governments have, of necessity, assumed the responsibility.

Provision of intrastate commuter passenger service by the LIRR, which involves ninety-five percent of its workforce, is not only a service typically and necessarily provided by local public transit systems throughout the country but it is an integral part of the MTA's comprehensive public urban transit system for the New York City metropolitan area. To classify one component of the MTA system as an interstate railroad for the purpose of overriding state laws applicable to public employees would be to exalt form over substance. Nonetheless, should this Court decide that the LIRR must be considered for this purpose an interstate railroad—rather than an integral part of the system of local public mass transit in this country—this Court should make clear that it is not concluding that local public mass transit is not an integral or traditional function of state and local government. Unlike interstate railroads, local public mass transit has never been subject to federal common carrier regulation. While it is APTA's position that the LIRR is simply an alternative to buses, subways or other mass transit vehicles for which it substitutes, both petitioner and the United States assert there is a constitutionally significant distinction. Petitioner contends that

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which it provides mass transit. In reversing an earlier Environmental Protection Agency (EPA) proposal to disapprove the New York City metropolitan area's public transit plan because it did not adequately meet federal Clean Air Act standards, the Administrator of the EPA stated:

> EPA agrees that the State should have ultimate responsibility for identifying its transit needs and deciding how to meet them . . . . Also, this approach appears in the proposed EPA/USDOT [Department of Transportation] national policy on basic transportation needs.

46 Fed. Reg. 44980 (Sept. 9, 1981).

the "LIRR is *unique* in that it is the only state owned and operated Class I railroad in the United States carrying both interstate freight and the travelling public."[16] Brief for the Petitioner at 13 (emphasis added). The United States argues that the LIRR is "plainly distinguishable from conventional intraurban transit systems." Brief for the United States as *Amicus Curiae* at 12. It expounds at length on the separate regulatory environment, histories and usages of the terms commuter rail and local public mass transit. *Id.* at 25-27, nn. 19-20. APTA urges the Court to find that the LIRR is an integral governmental function but, in any event, not to fashion a decision that would affect local public mass transit adversely without having a complete picture of those services before it.[17]

### D. The State Interest In Determining Whether Its Public Employees May Strike Prevails Over The Federal Interest In Labor Relations Even If A Balancing Test Is Applied

Justice Blackmun, in his concurring opinion in the plurality decision in *National League of Cities*, stated that it was his understanding that the Court "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426

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[16] Petitioner's elevation of interstate freight service to equal status with commuter service is disingenuous. In 1979, only 4% of LIRR's gross revenue was derived from freight operations. Respondents' Brief in Opposition to the Petition for Certiorari at 4. In that same year, less than 5% of the LIRR's workforce was engaged in the handling of freight. *Id.* Thus the overwhelming function served by the LIRR is its function other than freight transport—that of transporting commuter passengers.

[17] Those lower courts that have examined local public mass transit systems have all, except one federal district court, found these systems to fulfill traditional and integral governmental functions. *See* cases cited in note 1 *supra*.

U.S. at 856. The court below invoked this balancing approach to determine whether "the federal interest in regulating the collective bargaining relations of LIRR employees under the Railway Labor Act [outweighs] the State's interest in applying the Taylor Law." 634 F.2d at 24.[18]

The federal interest under the Railway Labor Act is to provide procedures for collective bargaining for the general purposes of avoiding "any interruption to commerce," to "provide for the prompt and orderly settlement of all disputes," and to forbid limitation of the "freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization." 45 U.S.C. § 151a (1976).

The first part of Justice Blackmun's balancing test requires an examination of the strength of this federal interest in comparison to the interest of the state. The state interest in determining whether its public employees should have an unsanctionable right to strike is so great that the federal interest cannot be said to outweigh it. Employee relations, including the determination of wages and hours, overtime compensation and whether public employees have a right to strike, is a matter of internal management of a state's affairs. A strike or threat of strike has severe implications for state budgets and cost planning, personnel administration, employee relationships, the continuity of important public services and the maintenance of public order. Indeed, the state's very ability to perform necessary

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[18] Other circuits have also found "helpful the balancing approach suggested by Justice Blackmun," *Public Service Co. of North Carolina* v. *Federal Energy Regulatory Comm'n.*, 587 F.2d 716, 721 (5th Cir.), *cert. denied*, 444 U.S. 879 (1979), and have compared the strength of the asserted federal interest with the state interest. *See, e.g., Peel* v. *Florida Dept. of Transportation*, 600 F.2d 1070, 1083-1085 (5th Cir. 1979); *United States* v. *Best*, 573 F.2d 1095 (9th Cir. 1978).

public services is significantly affected by potential strikes. Moreover, it is incongruous to impose federal rights to strike and strike procedures on some state employees involved in important public services but not on others. Such federal intervention is divisive and undermines the efficacy of state laws prohibiting strikes by other state employees who perform functions where the federal government has no interest or where its intervention is precluded by the Tenth Amendment.

In striking the balance in this case, the state interest in determining whether its own public employees performing an integral state function should have the right to strike is clearly paramount to the federal interest in uniform procedures for employee bargaining. Assuming *arguendo* that the fundamental purpose of both the federal and state statutes is to prevent strikes, a federal goal in so doing is to prevent disruption to the interstate rail system and a state goal is to prevent disruption to transit in the New York metropolitan area. In the event a strike shuts down the LIRR, it cannot be said that the disruption to the railroad industry at-large or to the interstate freight system from loss of the *de minimis* LIRR freight operations would be more harmful than the injury to the State of New York, and the New York metropolitan area in particular, from disruption of commuter transportation. Logic compels that New York State's need to determine the means of preventing disruption of LIRR service to the millions of city commuters far exceeds the interest of the federal government.[19]

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[19] *National League of Cities* has struck the balance between the federal interest under the Fair Labor Standards Act in regulating state employee relations and the state interest. It ruled in favor of the states. If this Court chooses to strike a different balance under the Railway Labor Act, it should make clear that it is not overruling *National League of Cities* and the judgment in that case regarding the Fair Labor Standards Act.

The second part of the balancing test requires consideration of whether state compliance is essential to accomplishment of the federal objective. Exemption of the LIRR from the federal statutory scheme would have an insignificant impact on the federal government's efforts to regulate labor relations since so little of the LIRR's activity is in interstate freight transportation. The United States cannot seriously claim that this result would frustrate achievement of the federal purpose.

Thus it must be concluded that the state interest in determining whether state employees should have the right to strike may not be displaced by the federal government.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION

*Petitioner,*

v.

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF RESPONDENTS, LONG ISLAND RAILROAD AND METROPOLITAN TRANSPORTATION AUTHORITY

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) moves the Court for leave to file the attached brief as amicus curiae in support of the Respondents, Long Island Railroad Company and Metropolitan Transportation Authority. The respondents have consented to the filing of the brief, but the petitioner has withheld consent. The letter granting consent has been lodged with the Clerk.

NIMLO submits that its brief can assist the Court in determining whether publicly owned and operated transit systems are integral and traditional governmental functions within the meaning of the principles of Federalism as expressed in *National League of Cities v. Usery*, 426 U.S. 833 (1976). NIMLO's interest in the issue is set out in the Interest of the Amicus Curiae section of the attached brief. That brief analyzes the historical development of transit operations in the United States from the days of private ownership and operation to the present situation of forced takeover and operation by state and local governments. It also considers the nature of the interest involved in the uninterrupted delivery of public transportation services.

Because of the widespread ownership and operation of transit systems by state and local governments, this case is of nationwide importance, and, we submit, the attached amicus brief will assist the Court in evaluating the nationwide importance of the decision in this case.

Therefore, we urge the Court to grant NIMLO leave to file the attached brief as amicus curiae.

Respectfully submitted,

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October 1981

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

## INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the more than 1600 local governments, or political subdivisions of states, who are members of the National Institute of Municipal Law Officers (NIMLO). These member local governments operate NIMLO through their chief legal officer, variously called city or county attorney, corporation

counsel, city solicitor or law director and other titles, with each member local government having one vote on all actions which are cast by the organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local government and the chief legal officers of the members of NIMLO in their official capacity.

The local government attorneys who participate in the work of NIMLO are responsible for advising local government officials, in cities and counties which own and operate a public transit system, on the subject of employment relations involving transit system employees. They assist in negotiating contracts between municipal transit systems and their employees, both through collective bargaining and through arbitration processes where they exist. They must also advise the local governing body when transit employees threaten and engage in strike actions.

Since *National League of Cities v. Usery*, 426 U.S. 833 (1976), local governments have structured their employment relations free of federal interference in those areas of integral and traditional government operations expressly identified by this Court. However, lack of guidance from this Court as to what constitutes integral and traditional governmental operations, produces uncertainty among local governments in providing public services.

The essential nature of public transit service and the very real threat of strikes by these public employees is of great concern to local government transit system owners. Laws such as New York's Taylor Law were enacted to prevent the interruption in the provision of essential government services such as public transportation. If the opinion of the Court of Appeals is left standing, it will

allow local government transit system owners to structure employment relations based on local needs and circumstances. Because the Court of Appeals properly analyzed the facts of the Long Island Railroad operations in determining whether those operations were integral and traditional governmental operations within the meaning of *National League*, NIMLO urges affirmance of the Judgment of the Court of Appeals.

## STATEMENT OF THE CASE

The Long Island Railroad (LIRR) is a state-owned and operated railroad, primarily engaged in the transportation of passengers from counties in Long Island to their jobs and businesses in New York City, and incidentally in the hauling of freight in interstate commerce. Pet. App. 4a.[1] The Metropolitan Transportation Authority (MTA), an agency of the State of New York, purchased the LIRR from the Pennsylvania Railroad in 1966, based upon a determination that private enterprise could no longer continue to provide the service. Pet. App. 21a. In 1968, the LIRR became part of the largest public transit operation in the country as subway and bus transit operations transporting some 5.5 million daily passengers were added to the jurisdiction of the MTA. Brief in Opposition, at 4.

Prior to its conversion to public benefit corporation status in February, 1980, the LIRR's 6,900 employees

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[1]In 1980, other railroads providing local passenger service in addition to freight services still maintained a high ratio of interstate freight revenue to aggregate revenue (96.9%) compared to the LIRR (4%). Brief in Opposition, at 6.

were the only employees of the MTA's work force of 50,000 public employees not covered by the Taylor Law. Brief in Opposition, at 6. Interestingly, one of the factors leading to enactment of the Taylor Law was the transit strike in 1966. Pet. App. 14a. The principal objective of the conversion to public benefit corporation status was to subject the LIRR employees to the Taylor Law. Brief in Opposition, at 3.

In light of the facts of the LIRR's operations, and the operation of public transit systems nationwide, the Court of Appeals held that the state's operation of a passenger rail service constituted an integral governmental function within the meaning of *National League of Cities v. Usery*, 426 U.S. 833 (1976), based on the finding that public transportation is a service that state and local governments are particularly suited to provide and have been forced to provide by a process of economic elimination of private suppliers. Pet. App. 18a. In addition, the Court found the importance of the LIRR's passenger service to the public greater than the state-operated freight line in *United States v. California*, 297 U.S. 175 (1936). Pet. App. 18a.

## SUMMARY OF ARGUMENT

State and local governments have long been involved in the provision of transit service to the public, historically as grantors of franchises to private transit companies to occupy the public streets and, more recently, as owners and operators of transit systems. The determination of whether and when transit operations are an "integral and traditional governmental function" under *National League of Cities v. Usery*, 429 U.S. 833 (1976), requires an

examination of the facts of public transit as it exists today.

The State of New York faced the termination of commuter rail service provided by a privately-owned railroad to the public when operating and capital costs could no longer be financed from the revenue produced by the private system. Rather than lose this essential public service, the State had no choice but to purchase and operate the system. Forced public takeover as occurred in the case of the Long Island Railroad is typical of the forced public takeover, occurring over the last two decades, of privately owned transit systems nationwide. Although publicly owned systems represent only 48% of the transit industry, they carry 91% of all transit passengers and produce 90% of all operating revenues.[2]

One of the primary services performed by public transit systems is the transportation of persons from their homes to downtown jobs and businesses. Interruptions caused by employee strikes in this essential public service produce disastrous results for commuters, the city and state, and local businesses. The pressure on the public transit owner to avoid a strike is great. Laws like New York's Taylor Law were enacted to avoid the interruption in the delivery of public services caused by a strike. Application of the Railway Labor Act which would allow employees of a state-owned and operated commuter railroad to strike in contravention of the state law prohibiting strikes by public employees, displaces the state's ability to structure employment relationships in furnishing an essential public service in violation of state constitutional powers as described by

[2]American Public Transit Association, *Transit Fact Book*, 1978-1979 ed., at 38-39.

this Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

With the advent of public takeover, a substantial program of government subsidization of capital and operating expenses has developed to maintain this essential public service. In conjunction with government subsidization of operating and capital costs, transit has become an important means of achieving governmental social, economic and environmental goals which benefit not only the transit passenger, but also the community in which the system operates.

The Court of Appeals properly analyzed the facts of the operation of the Long Island Railroad. Those operations were properly found to be an integral and traditional governmental function within the meaning of the principles set forth in Federalism as defined in *National League*.

## ARGUMENT

### I. THE QUESTION IN THIS CASE IS WHETHER A STATE-OWNED RAILROAD, PRIMARILY ENGAGED IN THE PROVISION OF COMMUTER SERVICE TO THE WORKING PUBLIC, AND ONLY INCIDENTALLY ENGAGED IN INTERSTATE FREIGHT OPERATIONS, IS AN INTEGRAL AND TRADITIONAL GOVERNMENTAL FUNCTION OF STATE AND LOCAL GOVERNMENTS

Public mass transportation systems, of which the Long Island Railroad (LIRR) is a part,[3] account for nearly 90% of the trips entering the central business district in cities like New York.[4] One of the primary services performed by these systems, as in the case of the LIRR, Brief for the Petitioner, at 13, is the transportation of persons from their homes to work and downtown businesses, and home again. Thus, the interest of the public transit system owner and operator in the uninterrupted functioning of the system is great. Disruption caused by labor strife is one of the greatest threats to the system's smooth operation and the economic stability of the community it serves.

At the very least, this case presents a very narrow question for decision by this Court. Both the Petitioners United Transportation Union (UTU), Brief, at 13, and the LIRR, Brief in Opposition at 3-4, agree that the LIRR is unique among operators of commuter railroads.[5] The high percentage of revenue derived from the LIRR's passenger service compared to that attributable to the hauling of freight in interstate commerce, which the Court of Appeals characterized as "but a fraction of the revenues of the LIRR," Pet. App. 10a, is not found elsewhere. The primary public interest, then, is in the smooth operation of the

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[3]Under the jurisdiction of the Respondent Metropolitan Transportation Authority, the LIRR is part of the largest transit operation in the Nation, carrying some 5.5 million daily rail, subway and bus riders. Brief in Opposition, at 5.

[4]University of Illinois at Chicago Circle, School of Urban Sciences, *Moving People: An Introduction to Public Transportation*, January 1981, at 5, hereafter referred to as *Moving People*.

[5]The United States is in agreement noting that the majority of the business of other carriers is derived from freight operations. *Amicus Curiae* Brief of the United States, at 29-30, n.24.

system so that commuters get to their jobs and downtown businesses via public transportation. This is especially true in cities like New York where such a high percentage of trips into the central business district are via public transportation.[6]

The Taylor Law was enacted for the protection of the public to assure the orderly and uninterrupted operations and functions of government by prohibiting strikes by public employees. Pet. App. 14a. Continuous public transportation is among the most important of government operations, the uninterrupted functioning of which the Taylor Law was designed to assure.[7] A transit strike leaves many commuters stranded, unable to get to work, and results in severe financial losses to downdown businesses and thus to the city and state and to their employees.[8] A strike produces adverse environmental effects as commuters turn to automobiles, thereby adding to traffic congestion and increasing air pollution. The government interests involved in this case, then, are those of the public interest of New York rather than any overriding public need of the federal government. And, in light of the nature of public transit operations today, this Court must conclude

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[6]*Moving People*, *supra*, n.4.

[7]As the Court of Appeals noted, the Taylor Law was in large part a response to the transit strike in 1966. Pet. App. 14a. Interestingly, the legislative history of Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. §1609(c) which requires as a condition of federal funding under that Act, that fair and equitable arrangements be made to protect the employees affected by the assistance, reveals that that section was not intended to supercede state laws forbidding public employee strikes. 109 Cong. Rec. 5671-73 (1963) (remarks of Senator Morse).

[8]A loss by New York City of $1.1 billion and $100 million daily by businesses during the 11 day transit strike in April 1980 was documented in the Court of Appeals. Pet. App. 15a.

that such operations are integral and traditional within the meaning of the principles of Federalism set forth in *National League* and other decisions of this Court.

## II. THE SELF-HELP PROVISIONS OF THE RAILWAY LABOR ACT MAY NOT CONSTITUTIONALLY BE APPLIED TO THE OPERATION OF A STATE-OWNED COMMUTER RAILROAD UNDER OUR NATION'S SYSTEM OF FEDERALISM

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the federal government could not, consistent with Federalism and the principles set forth in the Tenth Amendment, "exercise [its power to regulate commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[9] Application of the Railway Labor Act, which would allow employees of a state-owned and operated commuter railroad to strike in contravention of a state law which prohibits strikes by public employees is contrary to the public interests of states and local governments and displaces their ability to structure employer-employee relationships in discharging the dual functions of administering the public law and furnishing public services.[10]

There is no question that public transportation is a vital public service and that the state performs a vital public interest in providing it when private interests withdraw from this field of service. As the Court of Appeals noted, Pet. App. 15a, the freedom to strike has a negative influence on the collective bargaining process. The threat

[9] *National League of Cities, supra*, 426 U.S., at 855.

[10] *Id.*, at 851.

of a transit strike causes the public transit employer to agree to the payment of higher wages in order to avoid a strike.[11] The freedom to strike, embodied in the Railway Labor Act, displaces the state's decisions in structuring its employment relationships in the same manner as those decisions were displaced by the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, when it was amended to include nearly all employees of state and local governments.[12]

### A. THE FACTS OF PUBLIC TRANSIT OPERATIONS, AS EXEMPLIFIED BY THE OPERATION OF THE LONG ISLAND RAILROAD, DEMONSTRATE THAT TRANSIT IS AN INTEGRAL AND TRADITIONAL GOVERNMENTAL FUNCTION OF STATES AND LOCAL GOVERNMENTS

Transit operations in the United States have evolved from that of a public service provided primarily by the private sector to one which is today, of necessity, virtually exclusively provided by government.[13] Governmental in-

[11]Womack and Altschuler, *An Examination of the Transit Funding Process at the Local Level*, May 1979, at 18 "(While [public officials] may also feel pressure from voters and taxpayer groups if additional revenues must be found to pay wage settlements, these only come much later and permit more flexibility in diffusing the blame.) Hereafter referred to as *Transit Funding Process*.

[12]Fair Labor Standards Amendments of 1974, amending 29 U.S.C. §201 *et seq.*

[13]Publicly owned transit systems carry 91% of all transit passengers. 90% of the operating revenues of transit systems nationwide are derived from public transit systems. *Transit Fact Book*, *supra*, at 38-39.

volvement in transit operations, though, is certainly not new.[14] This dramatic and relatively recent forced rise in public ownership and operation of transit systems grew out of an overall decline in the use and revenues of the private transit industry following World War II.[15] During the same period, increased operating costs added to the private transit system owner's financial difficulties.[16] In the mid-1960s, operating costs were approximately equal to operating revenues. In 1974, operating expenses were more than one and one half times greater than operating revenues.[17] Small wonder that private operators quit this field of service!

Several factors have been identified as contributing to the decline in the local transit industry. The general move out of the central city and into the suburbs with the accompanying rise in the use of the automobile was a

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[14]*Munn v. Illinois*, 94 U.S. 113, 125 (1876) "[In the exercise of the police power] it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen. . .and in so doing to fix a maximum charge to be made for services rendered. . . ."

[15]In 1950, transit carried 13.8 billion passengers. By 1977, ridership had decreased to 5.7 billion. *Moving People*, *supra*, at 5.

[16]Between 1950 and 1970, operating costs per transit mile increased an average of approximately 4.2% per year while the consumer price index for the same years increased an average of only approximately 2.4% per year. Institute of Public Administration, *Financing Transit: Alternatives for Local Government*, July 1979, at 8-9, hereafter referred to as *Financing Transit*.

[17]*Transit Fact Book*, *supra*, at 20-21.

major factor.[18] Increased labor costs were another factor.[19] A third factor was the cost of accomplishing certain governmental social and environmental goals, among them the provision of special services for school children, the elderly[20] and the handicapped.[21] The cost of complying

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[18]*Moving People, supra*, at 15-16, 18. Given the lower density in suburban areas, the cost of transit service per passenger greatly increased. Another phenomenon known as "peaking," or the concentration of riders during the rush hours, in combination with labor contracts requiring overtime for hours worked in excess of eight, actually makes rush hour service more costly than non-rush hour services.

[19]A substantial proportion (75%) of operating expenses are attributable to wages and related benefits. In 1950, the average annual transit wage was higher than the wages of manufacturing and city employees. Between 1950 and 1975 the rate of increase in transit wages was more than 50% greater than that for manufacturing employees. *Financing Transit, supra*, at 8, 11.

[20]Rates for the elderly and handicapped during non-peak hours may not exceed one-half of the rates generally applicable during peak hours. 49 U.S.C. §1604(m).

[21]Based on the requirements of §504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C §794, and §16 of the Urban Mass Transportation Act, as amended, 49 U.S.C. §1612, requiring that mass transit be accessible to the handicapped and elderly, the Department of Transportation adopted implementing regulations, in conformance with the HEW guidelines, which became effective May 31, 1979. 49 C.F.R. §§27.81-27.119 (1979). The regulations were found to exceed the Department of Transportation's authority under §504. *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981). The Department of Transportation has promulgated an interim rule requiring recipients of federal funds to certify that special efforts to provide transportation that handicapped persons can use are being made pending reconsideration of the regulatory requirements under § §504 and 16. 46 Fed. Reg. 37488 (July 20, 1981).

with conditions attached to federal and state subsidies has contributed to an overall decline in system productivity as measured by revenue passengers per employee during the period between 1950-1976.[22]

Faced with the prospect of losing essential transit service, state and local governments have been forced to purchase and operate the private systems. With enactment of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. §1601 *et seq.*, the federal government made federal funds for acquisition of private systems available.[23] Since enactment of the UMTA, the federal government has been heavily involved in the subsidization of public transit systems.[24]

The history of the operation of the Long Island Railroad fits the pattern of forced takeover by state and local governments of financially troubled private systems as the only alternative to loss of this essential public service. The financial difficulties of the LIRR were typical of other privately owned commuter railroads. Brief in Opposition, at 12.

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[22]*Financing Transit*, *supra*, at 2. Among the conditions adding to labor costs identified by one commentator are the prevailing wage requirements, 49 U.S.C. §1609(a), and the requirement that the Secretary of Labor determine that "fair and equitable arrangements are made. . . to protect the interests of employees affected by [federal] assistance." 49 U.S.C. §1609(c). Generally, the Secretary will grant certification only if all affected unions concur. Competitors threatened by publicly aided service improvements are generally entitled to compensation or are bought out. 49 U.S.C. §1602(e). A. Altschuler, Changing Patterns of Policy: The Decision-Making Environment of Urban Transportation, *Public Policy*, Spring 1977, at 171, 194.

[23]Funds for acquisition are authorized under 49 U.S.C. §1602.

[24]The federal government contributes 80% of the total financial assistance for capital expenditures and 10.9% of all operating assistance. *Moving People*, *supra*, at 70.

As the Court of Appeals noted, the state's purchase of the railroad in 1966 "was premised on its finding that private enterprise would be unable to continue to own and operate the facility." Pet. App. 21a, n.27.

The LIRR is the only common carrier railroad serving Long Island. Brief for Petitioner, at 10. It carries a daily ridership of 260,000 which is primarily commuter in nature, Brief in Opposition, at 9, generally of the home to work type. Brief for Petitioner, at 13. The railroad receives the benefit of substantial federal subsidization since its takeover by the state, having received an estimated $450,000,000 between 1967 and 1980. Brief for Petitioner, at 10, n.7.

The mere fact of forced public takeover and operation of such a substantial portion of the private transit industry over the last two decades should be sufficient to satisfy *National League's* test of integralness. But, there are other distinguishing features of public transit operations which lend support to the argument.

Although transit is not a free public service due to the tradition of charging fares, it is not a self-supporting public utility like telephone or electric utilities. Transit competes with individual motorists while utility companies enjoy the status of government-protected monopolies.

After forced public takeover, the transit system has ceased to operate as it did when privately owned. Increased costs are not always passed on to the consumer as is the case with other utilities. Nor are fares necessarily tied to transit costs per passenger.[25] On the contrary, increasingly

[25]Between 1950 and 1970, fares rose slightly less than transit costs per passenger. However, between 1970 and 1975, transit costs per passenger rose 14.3% per year while fares rose only 3.6% per year. *Financing Transit, supra*, at 8, 10.

less and less of the operating expenses are recovered from fares.[26] Rather, publicly owned transit systems are supported by tax revenues from transit and non-transit riders who also benefit indirectly from transit service.[27]

Public takeover has not cured the financial problems of transit systems. Despite heavy subsidization, transit continues to operate at a deficit.[28] In 1978, transit operating expenses exceeded operating revenues by $30.6 million.[29] As public takeover has occurred, public attitudes toward the financing of transit have changed.[30] There is a great reluctance to raise fares in cities experiencing public takeovers, accompanied by pressures to provide special services and higher wages to avoid transit strikes.[31]

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[26]Prior to World War II, nearly all operating and capital expenses were recovered from revenue attributable to fares. By the 1960s, only operating costs were recovered from fares, and by the late 1970s, fares accounted for only half of all operating expenses and none of the capital costs. *Moving People*, *supra*, at 15.

[27]In 1979, over $129 million in taxpayers' funds were invested by the state in the LIRR for operating expenses alone. Between 1966 and 1980, hundreds of millions of dollars in state subsidies have been invested for capital expenses. Brief in Opposition, at 6.

[28]The threatened loss of federal operating and capital subsidies will, for many systems heavily dependent on federal aid, make a bad situation worse. *The Weekly Bond Buyer*, p. 5, July 13, 1981.

[29]*Transit Fact Book*, *supra*, at 20-21.

[30]*Transit Funding Process*, *supra*, at 4.

"In our case study cities we found a widespread expectation that public ownership and subsidization would stabilize transit finances by reducing operating costs (through new capital) and by helping to attract new riders. However, more nearly the opposite has occurred: unit costs (per vehicle mile and per passenger) have increased rapidly in constant dollars during the period of public, subsidized operation. Consequently, the amount of public support needed to continue systems operations at a given level has continued to grow rapidly. . . ."

[31]*Id.*, at 18.

Finally, aided by heavy government subsidization, transit has become an integral component of the local government planning process. That process is designed to achieve governmental social, economic and environmental goals for the benefit of society as a whole and not just the transit passenger.

Transportation planning has become an integral component of the overall comprehensive land use planning process occurring at the local level. The availability of public transportation allows land in the central business district to be used at its highest potential, for commercial office space, thus reducing its use for traffic and parking needs.[32] This is dramatically illustrated by the facts in this case. State officials have estimated that 52 additional lanes of expressway going into and out of New York City would be required to accommodate traffic if the LIRR went out of service and 10 city blocks would be needed solely for parking. Pet. App. 17a. Access to public transportation attracts economic development, thus aiding urban revitalization efforts.[33]

Public transportation figures prominently in the governmental goal of achieving cleaner air as found in the Clean Air Act.[34] The consistency requirements of the UMTA illustrate the importance of public transportation to the governmental planning process designed to achieve this

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[32]The Impact of Transportation on the Central Business District, *Traffic Quarterly*, October 1980, p. 523.

[33]Cities have experienced considerable growth in construction of commercial office space in the vicinity of public transit stations. Public Transit and Downtown Development, *Metropolitan*, May-June 1980, at 48.

[34]42 U.S.C. §7401 *et seq.*

goal. Activities approved, supported or funded by the Department of Transportation must conform to the State Implementation Plan required under the Clean Air Act.[35]

As government involvement in transit service has grown, the benefits accompanying transit have spread beyond transit users to all segments of society. It is doubtful that such governmental goals as urban revitalization, clean air and energy conservation would be attainable if public takeover had not occurred. The only conclusion to draw is that public transit operations are and have been integral operations of traditional governmental functions.

### B. THIS COURT'S DECISION IN *HODEL V. VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION* IS NOT DETERMINATIVE OF THE ISSUE IN THIS CASE.

Appellant's reliance on this Court's recent decision in *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. ____ (June 15, 1981) is misplaced. Brief for Petitioner, at 19. *Hodel* involved a challenge, based on the Tenth Amendment and the principles of Federalism as expressed in *National League*, to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.* (Mining Act).

We submit that *Hodel* is not determinative of the issue in this case. As found by this Court, the regulatory scheme employed in the Mining Act was one of "cooperative federalism." It did not require the state to participate in the Federal program. Slip op., 22. Rather, the challenged

[35] 42 U.S.C. §7506(c).

provisions of the Mining Act governed only the activities of the private coal operators and thus the requirement of *National League* that the challenged federal statute must regulate "States as States" was not met. Slip op., 21

Unlike the challenge in *Hodel*, the challenge here, as in *National League*, is to the direct application of a federal statute, the Railway Labor Act, to the state of New York as employer to limit its decisions as to the structuring of its employment relations. There is no program of cooperative federalism involved here. The governmental transit system owner has no choice whether or not to be governed by the Railway Labor Act, just as it had no choice whether to comply with the Fair Labor Standards Act.

Moreover, this Court in *Hodel* noted the national interest in the environment and the economy as affected by the surface mining industry. Slip op., 12. No such national interests exist here. Rather, the interest in this case is in avoiding interruptions in the provision of public services, and this interest is purely local. Congress recognized the local nature of this interest when it exempted all municipal labor relations from the provisions of the National Labor Relations Act, 29 U.S.C. §152(2).

## CONCLUSION

Faced with the certain prospect of losing public transit services provided by privately owned and operated transit companies, state and local governments have been forced in locality after locality to purchase the financially troubled private systems all over our Nation in order to continue to provide this essential public service. Typically, employees of the private transit company have become public employees.

With the aid of substantial federal, state and local subsidies, transit has become an integral part of the governmental planning process and is the vehicle for the accomplishment of governmental social, economic and environmental goals which aid not only the transit rider, but society as a whole.

Public employee labor relations have traditionally been matters of local interest, as distinguished from matters of national interest. Strikes by public employees are the greatest threat to the delivery of public services by state and local governments. Local laws such as New York's Taylor Law are designed to assure the uninterrupted delivery of essential governmental services to the public.

Public transportation is one such service the interruption of which produces drastic results. The operations of the LIRR are an integral component of the largest public local transit operation in this Nation. This Court should not allow this case to turn on the incidental 4% freight operations of that railroad.

The concept of what is an integral governmental function should not be static because governing is not static. Whether it takes a year or several years of public operation to denominate a public function as a traditional governmental function, there can be no doubt that public transit operations are an integral and essential governmental service under the facts of our day. The decision of the Court of Appeals should be affirmed.

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No. 80-1925

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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UNITED TRANSPORTATION UNION,

*Petitioner,*

v.

LONG ISLAND RAIL ROAD COMPANY AND METROPOLITAN TRANSPORTATION AUTHORITY,

*Respondents.*

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**On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

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## BRIEF OF THE NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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## QUESTION PRESENTED

The Long Island Rail Road Company is a common carrier, owned and operated by an agency of the State of New York, and is primarily engaged in commuter service. The question presented is whether the Railway Labor Act may, consistent with the Tenth Amendment, secure to employees of the railroad the right to strike denied them by state law.

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**On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF THE NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

### INTERESTS OF THE AMICUS CURIAE

This *amicus curiae* brief of the National League of Cities is submitted with the written consent of all the parties. The letters of consent are on file with the Clerk. Rule 36.2.

The National League of Cities ("NLC") is an instrumentality of United States cities established in 1924 and organized in 1933 as an Illinois not-for-profit corporation to assist municipalities in performing their functions. Its membership includes direct member cities, state leagues of municipalities and state league member cities. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights, and privileges of municipalities." It is in this capacity that NLC offers its views in the case at bar.

Once again, this Court is called upon to clarify the circumstances under which state laws governing conditions of employment for state public employees and associated state actions as employer will be protected from federal interventions based on the federal authority to regulate commerce between the states. Accordingly, the issues before this Court involve the structures of Constitutional federalism and how these organizing principles may be applied to determine in this case whether employees of the Long Island Rail Road can or cannot strike. The question is which level of government, federal or state, should have the authority to make and enforce that policy decision, and by extension, under our federal system which level of government will be held accountable for the consequences of that decision.

NLC's interest in this controversy stems from its concern that states and cities must retain reasonable direction and control over the affairs of state and municipal instrumentalities. Direction and control includes the authority to establish the basic conditions of employment (as exemplified by wages, hours, labor relations and the right to strike) in state and municipal agencies. To function effectively, and to be understood and supported by its citizens, the organizing principles of our federal system of governance requires a reasonable association between authority and responsibility. If state sovereignty has any import today, it must mean that states, as responsible governmental entities, retain the authority to determine, for example, if state employees shall be accorded the right to strike.

Moreover, in the view of NLC, providing essential local transportation means for the commuting public is the kind of governmental service which is characteristic of state and local governments and should be so regarded in the Constitutional sense. Therefore, the function

should be protected from unjustified federal interference. Federal interventions into the substance of local government should not be condoned with vague explanations that the activity in question does not merit Constitutional protections because it is not "traditional" or not sufficiently governmental or otherwise is not a sufficiently normal local governmental function. State and local governments should be permitted to exercise their authority in a manner which they and their citizens deem to be in the public interest, in the absence of some overweening federal interest. This, in the federal system, is the essence of and justification for local government. *See, e.g., Village of Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 389 (1926).

And finally, NLC is concerned that the principles espoused by the Petitioner herein and those endorsed by the United States as *amici curiae*, namely, that New York State is in the railroad business and as such is subject to unrestrained federal Commerce Clause regulation, if adopted by this Court, would serve in due course further to undermine the ability of states to perform adequately their roles and responsibilities in the federal system.

Accordingly, NLC seeks to put the controversy before the bar into a larger context and to demonstrate that the salient issues before the Court involve, in the first instance, the ability of states and municipalities to function in the federal system and, equally important, the ultimate capacity of that federal system to perform effectively for all the people.

## STATEMENT OF CASE

This case arose from a labor dispute between employees of the Long Island Rail Road Company ("LIRR"), represented by Petitioner, United Transpor-

tation Union ("UTU"), and Respondents LIRR and the Metropolitan Transportation Authority ("MTA"), the New York State agency responsible for the LIRR. Petitioner UTU sought declaratory relief establishing that LIRR employees are covered by the Railway Labor Act ("RLA"), 45 U.S.C.A. §151 *et seq.*, (1972 & Supp. 1981) and accordingly possess the right to strike established therein. Petitioner also sought injunctive relief barring enforcement of New York's "Taylor Law," N.Y. CIV. SERV. LAW §200 *et seq.*, (McKinney 1973 & Supp. 1980), which prohibits public employee strikes, on the ground that the RLA preempts the state law. The District Court granted summary judgment to Petitioner (Pet. App. 29a-46a) but the Court of Appeals reversed (Pet. App. 1a-25a), holding that application of the RLA to secure the right to strike to the LIRR's employees is inconsistent with the Tenth Amendment.

The Court of Appeals found the LIRR to be a common carrier and a wholly owned subsidiary of a state agency. The Petitioner and the United States government as *amicus curiae* argued that the railroad as a carrier was subject to the federal law. The MTA and the LIRR said that as a state-owned and operated agency the railroad and its employees were Constitutionally protected from federal incursions in the circumstances and subject only to the state law.

The question before this Court comes down to whether state governments or the federal government will control the labor relations and the right to strike of state public employees working for a state instrumentality operating a railroad. The issue is whether state policy or federal policy will rule under the current precepts of federalism and the Tenth Amendment.

Because the case at bar involves questions of Constitutional federalism and the structures of the federal system, NLC urges this Court that its decisions must be made in the light of a realistic appraisal of the current characteristics of the federalism of the 1980's.

Succinctly put, it is the view of the *amicus* that in recent times our federal method of governance has been seriously weakened and endangered by the persistent intrusiveness of the federal government, a government which characteristically intervenes in matters of state and local government concern without accepting responsibility for the results of that intervention. For example, in the case at bar will the federal government assume responsibility and respond to the Long Island commuters if the state employees of the LIRR strike when state policy and state law preclude such a strike? In the federalism of the 1980's, federal intervention without accountability for the consequences is undermining the effectiveness of our federal system.

The grounds for NLC's concern for the efficacy of the federal system is well documented and articulated by the Advisory Commission on Intergovernmental Relations ("ACIR") in its recent ten-volume analysis of and report on the national government's role in the federal system.[1]

The ACIR report characterizes federalism in the 1960's as a relatively simple and cooperative arrange-

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[1] In 1976 Congress directed the ACIR to prepare a major multipart study of the American federal system. The findings summarized in this brief have been distilled from the ACIR's final volume, X Advisory Commission on Intergovernmental Relations, *An Agenda for American Federalism: Restoring Confidence and Competence*, (A-86 June, 1981).

ment. Few, if any, municipal functions and only about one-half of the states' responsibilities, were touched by federal programs. The legislative process of the day reflected a capacity to differentiate between most local and several state functions and what, politically, was deemed to be of national concern. Dual federalism, with its intergovernmental separation of functions, finances and personnel was found by the ACIR still to be an operational fact in the 1960's.

The federalism of the 1980's, according to the ACIR, and NLC agrees, is remarkably different. Over the intervening years there has been a dramatic expansion of the policy-making role of the federal government in domestic affairs. And the federal methods, cooperative in name, have become co-optative and even antagonistic in practice.

The ACIR report expresses its concern, not for the intricacies and inconsistencies of the evolving new federal arrangement, but for how these changes have combined to produce an interpretation and application of the Constitutional principle of federalism wherein the adaptive and workable features of the inherited system are in danger. Dysfunctionality, the ACIR finds, has been substituted for functionally and rigidities for flexibility. These systemic transformations have become the focus of the ACIR's apprehensions.

The changes which have accumulated in the past two decades, the ACIR avers, have produced neither a dual nor a cooperative brand of federalism, but an increasingly dysfunctional form of federalism. Contemporary intergovernmental relations, the ACIR's research finds, have become more pervasive, more intrusive, more unmanageable, more ineffective, more costly, and above all, more unaccountable.

It is the view of the *amicus* that these characteristics of the federalism of the 1980's are material to the questions presented. This is the context in which the decision of this Court must be made.

## SUMMARY OF ARGUMENT

At issue is whether federal law can authorize state government employees to strike when state law prohibits a strike. The question presented is not whether the Congress can regulate a state-owned and operated railroad, LIRR, but whether the federal Railway Labor Act may regulate the state as an employer and decree conditions of employment for state employees working for the LIRR.

As the Court of Appeals determined, the principles enunciated by this Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) and clarified in *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, 49 U.S.L.W. 4654 (U.S. June 15, 1981) preclude the use of the federal Commerce Clause power to infringe upon the sovereignty of state governments and to undercut their ability to perform their Constitutional role in the federal system.

Providing necessary transportation means for goods and people is a traditional service of state governments and their instrumentalities commencing with colonial times. Determining basic terms of employment for state employees engaged in providing transportation services or otherwise is a protected attribute of state sovereignty. And state decisions involving the need to operate a railroad and the employment terms for state employees working on that railroad constitute essential decisions regarding the conduct of integral government functions and are protected as much from federal interference under *National League of Cities.*

Finally, in the case at bar, the interests of the state in these matters far outweigh the interests of the federal government. Accordingly, the decision of the Court of Appeals should be affirmed.

## ARGUMENT

### I. The Rationale Of *National League Of Cities v. Usery* Requires That The Decision Of The Court Of Appeals Be Affirmed.

At issue is whether federal law can authorize state government employees to strike when state law prohibits a strike. The objectional feature of the RLA is not that it regulates a state-owned and operated railroad, but that the federal law regulates the state as an employer. The question is not whether under its power to regulate commerce among the states, the Congress has the authority to regulate the LIRR.[2] When the federal law impacts

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[2] "Whether a transportation agency is a common carrier depends not upon its corporate charter or its declared purpose, but upon what it does." *United States* v. *California*, 297 U.S. 175, 181 (1936). (Citing, *United States* v. *Brooklyn Terminal*, 249 U.S. 296, 304 (19___)). Accordingly, a state-owned and managed railroad which operated in the San Francisco harbor area was held to be a common carrier subject to fines for failure to use safety equipment (automatic couplers) required by the federal Safety Appliance Act. The Court rejected the argument that the federal requirements infringed on state sovereignty. However, these federal safety requirements do not appear to be a serious intrusion upon either state sovereignty or the states' ability to function effectively in the federal system. In 1957, in a suit brought by employees of the same state-owned railroad, the Court declared that the railroad's labor relations where controlled by the federal Railway Labor Act. *California* v. *Taylor*, 353 U.S. 553 (1957). Under the federalism of the 1950's, the Court gave short shrift to state sovereignty as a moving consideration. By operating a common carrier, the state relinquished its sovereignty to the federal government. 353 U.S. at 568. Moreover, the Court found the employees of the state railroad to be something more than state employees; they were members of the railroad fraternity. "The railroad,

directly on the state as an employer, the question is whether, under the principles of federalism as exemplified by the Tenth Amendment, the authority of the federal government to regulate the LIRR has been exercised in a fashion that impairs the States' integrity or their "ability to function effectively in a federal system." *Fry* v. *United States,* 421 U.S. 542, 547 n.7 (1975).

The federal regulation in question impinges on the activities of a state agency which is providing basic, essential and traditional services to the citizens of the State; the regulation aspires to control fundamental employer-employee relations between the state and its employees in derogation of the states' inherent sovereignty in such matters; the regulation thereby forecloses the state from making essential decisions regarding the conduct of integral governmental functions.

The Court of Appeals has ruled in these circumstances that under the rationale of *National League of Cities,* the federal government may not force upon New York State federal choices with respect to the right of state employees to strike. The *amicus* urges this Court to affirm.

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world for which the Act was designed has been described as 'a state within a state.' Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . ." 353 U.S. at 565. *But see: Amell* v. *United States,* 384 U.S. at 158. The rulings in *California* v. *Taylor* are at least dated; they have little relevance to the LIRR, given the characteristics of federalism in the 1980's. Today there is little reason to conclude that by operating a public mass transit system to meet the needs of its citizens, a state must forego to the federal government its Constitutionally protected sovereignty and its authority over decisions regarding the conduct of integral state functions.

### A. *Responsibility For Matters Relating To The Transportation Of Goods And People Is A Primary And Traditional Responsibility Of States And State Instrumentalities.*

Increasingly, our courts now comprehend that operating public mass transit systems is a normal activity of state and local governments. That such a system may be defined by the federal government as a "carrier" does not change the fundamental character of the system.

Since *National League of Cities,* federal courts have been required to rule on whether providing transportation facilities and services is a traditional function of state and local governments and, therefore, not subject to the strictures of the federal Fair Labor Standards Act, 29 U.S.C.A. § 201, *et seq.*, (1976). Most have concluded that concern for the transportation needs of citizens and the operations of transportation facilities, such as municipal airports and public mass transit systems to serve these needs, are traditional concerns and traditional functions of states and their instrumentalities. *Amersbach* v. *City of Cleveland,* 598 F.2d 1033 (6th Cir. 1979); *Alewine* v. *City Council of Augusta,* 505 F.Supp. 880 (S.D. Ga. 1981); *Francis* v. *City of Tallahassee,* No. 79-446 (2d Cir. Dec. 8, 1980); *Dove* v. *Chattanooga Area Regional Transportation Authority,* C.A. No. 1-80-249 (E.D. Tenn. July 21, 1981). *Contra, Joiner* v. *City of Macon,* C.A. No. 79-287-MAC (M.D. Ga. April 27, 1981).

From the beginning in this country, municipal governments, initially in their own right and subsequently as instrumentalities of state governments,[3] were required to

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[3] During the colonial period some twenty-four municipal corporations received charters as cities, most of which were confirmed after the Revolution by the legislature of the state in which the city was located. 1 E. McQuillin, *Municipal Corporations,* §1.09, 11 (3d Ed. 1970).

concern themselves with the movement of goods and people as a means of assuring the safety, happiness and prosperity of their citizens. The perpetuation of even the relatively simple colonial economies demanded mobility for individuals and their effects. Thus colonial boroughs were accorded powers concerning such matters as the regulation of the use of public ways, setting limits to the speed at which a horse could be ridden or driven in the streets, restricting the size of wagons and otherwise addressing facets of colonial transportation as they existed in those times.[4]

As state and municipal economies evolved, transportation-related demands on state and local governments grew more complex. In due course, in addition to functions associated with building, maintaining and regulating the use of alleys, streets and public highways, these governments found themselves concerned with entirely new transportation entities such as street railways, elevated, surface and underground subways and other dimensions of mobility as well, such as conduits for the transportation of water, gas and electricity.[5]

And later, when the administrative demands of governance required more organized and more comprehensive planning, state and local governmental planning objectives traditionally encompassed not only streets and transportation systems but also all the elements needed to provide convenient, smooth-flowing and efficient transportation of persons and things.[6] Thus, state and local governments were required, over time, to produce facilities for the transportation needs of pedestrians, au-

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[4] *Id.* §1.14 at 15.

[5] *Id.* § 9.05 at 631.

[6] *Id.* §1.73 at 108.

tomobiles, buses, trains, streetcars, subways, steamships and airplanes. The future will bring new demands.

The point is obvious and inescapable. State and local governments seeking to protect and to enhance the welfare of their citizens must do whatever may be necessary to meet the transportation requirements of their citizens and the transportation needs of the changing local economies upon which the citizens depend for their livelihoods. Consequently, when the State of New York was faced with the possible collapse of the Long Island Rail Road, an element cirtical to the Long Island transportation network, the State had no alternative but to step in and do what, in its sovereign wisdom, it deemed necessary to facilitate the flow of goods and people so essential to the welfare of that area.

In light of the historical evolution of the role and associated responsibilities of state and local governments with respect to the movement of people and goods, and in the face of the transportation needs of the residents of Long Island, it seems clear and beyond argument that when the State of New York took over the LIRR, by providing the transportation services essential to the welfare of its citizens, it was performing a basic, essential and traditional function of state government.

**B.** ***Authority To Regulate The Right Of State Employees To Strike Is Indisputably An Attribute Of State Sovereignty.***

This Court has said that "[o]ne undoubted attribute of sovereignty is the States' power to determine the wages which shall be paid to those whom they employ to carry out their governmental functions. . . ." 426 U.S. at 845. Similarly, the determination of whether or not or in what circumstances an employee of the State may strike also clearly is a matter which is the State's alone to determine. Such a determination is central to the relationship between the State, as employer, and State employees.

The claim of the Petitioner, supported by the United States as *amicus curiae*, that the ability of state employees to strike must be controlled by federal rather than state law is not without its ironies. Under federal policy, to strike is not a privilege which, in its sovereign wisdom, the federal government accords federal employees. 5 U.S.C.A. § 7311(3) (1980). Indeed, a strike by a federal employee is a crime, 18 U.S.C.A. §1918 (1970), and an appointment affidavit is required of federal employees to implement this federal no-strike policy. 5 U.S.C.A. § 3333 (1977). *See: United Federation of Postal Clerks* v. *Blount*, 325 F.Supp. 879 (D. D.C. 1971) *aff'd*, 404 U.S. 802 (19 ___). New York State, probably moved by the same considerations as the federal government, also has promulgated similar no-strike rules for its employees. Taylor Law, N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973 & Supp. 1980). Nevertheless, Petitioner urges that the same sovereign privileges with respect to its employer-employee relations exercized by the federal government should be denied the state government. The Court of Appeals was not persuaded.

In its brief, Petitioner emphasizes that the LIRR is a carrier within the meaning of the Railway Labor Act. This fact, however, does not operate to change the nature of the relationship between the employees of the railroad and the state. The state, not the railroad, is the employer of the railroad workers. They are public employees, not railroad employees. *See: Amell* v. *United States*, 384 U.S. 158 (1966), where this Court, regarding federal employees working aboard government vessels, considered whether "these seafaring petitioners are more appropriately classified as federal workers or as mere seamen," 384 U.S. at 160, and concluded they were federal employees because they were so regarded by the Congress.

The dictates of state sovereignty suggests that the privilege to classify their employees as employees of the State, and to specify that employees may not strike, should be accorded the State in the case at hand.[7]

### C. *Federal Displacement Of States' Employer-Employee Relationship Impermissibly Interferes With Integral State Functions.*

As explained above, coping as practical with the transportation needs of the public is a traditional and essential service of state and local governments. In discharging this responsibility, the State of New York found it necessary to take over the operation of the LIRR and, in due course, as a response to labor difficulties, to convert the LIRR from a stock corporation to a public benefit corporation whose employees would be subject to the Taylor Law as public employees of the State. In so doing, the State was exercising its choices as to how essential decisions regarding the conduct of integral governmental functions were to be made.

Both the decision to respond to the Long Island transportation crisis by acquiring the LIRR, and the decision which decreed the ultimate organization of the LIRR in order to carry out state transit policy, were normal acts of state government and the exercise of state sovereign authority in these matters. To apply to such state acts the requirements of the federal Railway Labor Act, as the Petitioner and the Untited States urge, is to displace the judgments and decisions of the State and to substitute federal rules which decree how labor relations involving

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[7] *But see: California* v. *Taylor*, where in the face of state arguments to the contrary, the Court (arbitrarily, the *amicus* would urge) declared state employees to be railroad employees based apparently on the character of their work rather than the character and policies of their employer.

state employees of a state instrumentality will be conducted generally and with particular reference to the right of state employees to strike.

The *amicus* suggests that this kind and degree of federal interference in the "States' freedom to structure integral operations in areas of traditional government functions" and that this displacement of state powers "impairs the States' ability to function effectively in a federal system." 426 U.S. at 852 and 843. And further, that the principles of federalism applied by this Court in *National League of Cities* preclude such use of the federal authority to regulate commerce between the states.

Accordingly, the decision of the Court of Appeals should be affirmed.

**II. The Relative Interests Of The Federal And State Governments In This Controversy Suggest That The Decision Of The Court Of Appeals Should Be Affirmed**

A comparison of the interests of the national government with that of New York State in the controversy before this Court suggests that the federal interest is insubstantial. As a commuter facility, the LIRR has a minimal impact on interstate railroading. Moreover, the stated aim of the RLA is to avoid interruption to the operation of any carrier, 45 U.S.C.A. §151a (1972), and the application of the New York Taylor Law in the circumstances is likely to be equally effective to that end.

In contrast, the State's interest in controlling its employer-employee relations is paramount and goes to the essence of state authority. While the Petitioner may have a significant interest in this controversy, the federal government does not.

In the view of the *amicus*, the United States still aspires to set the wages, hours, labor relations and strike priv-

ileges of all the employees of all state and municipally owned and operated local mass transit systems. See, for example, the Department of Labor's ruling applying the federal Fair Labor Standards Act to all state and municipally operated local mass transit systems on the grounds that such activities are not "traditional" state functions and, therefore, do not fall within the purvue of *National League of Cities.* 29 C.F.R. §§ 775, 775.3(b)(3) (1980). This Court should not encourage such encroachments on state sovereignty.

In light of these considerations, the *amicus* urges this Court that the decision of the Court of Appeals should be confirmed.

## CONCLUSION

The *amicus* suggests that the importance of the case at bar may be less what it signifies for the employees of the LIRR than what it may portend for the efficacy of the federal system of governance for the 1980's. As we have noted earlier, contemporary intergovernmental relations have become more pervasive, more intrusive, more unmanageable, more ineffective, more costly and above all, more unaccountable. These are realities to which governments at all levels must respond. These are trends which should not be encouraged by any court.

This Court, of course, from time to time has expressed its concern with the condition of the federal system. The recent comments of Justice Rhenquist and Justice Powell in *Virginia Surface Mining and Reclamation Association* immediately come to mind. In concurring with the Court's judgment reversing a holdng of the lower court that the Surface Mining and Reclamation Control Act of 1977, 30 U.S.C.A. §1251, *et seq.*, (Supp. 1981) was unconstitutional, among other reasons, as an unacceptable infringement on state sovereignty, Justice Powell observed:

> The Surface Mining Act mandates an extraordinarily intrusive program of federal regulation and control of land use and land reclamation, activities normally left to state and local governments. But the decisions of this Court over many years make clear that, under the Commerce Clause, Congress has the power to enact this legislation. 49 U.S.L.W. at 4664.

And Justice Rhenquist in his concurring opinion said:

> It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction. Although it is clear that the people, through the States, *delegated* authority to Congress to "regulate Commerce . . . among the several states." U.S. Const., Art. I, § 8, one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress. *Id.* at 4665.

Justice Rhenquist concludes that given our dual system of government there still exist limits to the federal commerce power. But from the state view, those limits are a horizon that always recedes as it is approached by the federal government. Certainly, the *amicus* brief of the United States in the case at bar does not speak of limits. And the ruling of the Department of Labor, referred to earlier, which attempts to apply federal wage and hour laws to state-operated public transit systems, does not suggest that restraint or a respect for state sovereignty are readily perceived characteristics of our federal government.

In the view of the *amicus* unless more deference is accorded the states' role in our dual system, that role will succumb to the Commerce Clause. The national econo-

my of the 1980's is composed of many complex and highly interdependent elements; everything relates to everything else. Given that fact of economic life, it is always possible to argue, for example, that almost any act of city government — taxing, zoning, regulating, building — not only has a substantial effect upon the city economy, but in turn also affects larger economies and commerce between the states as well. Does it follow, then, that any act or function of municipal government is potentially subject to federal preemption under the Commerce Clause? What are the limits to this federal power?

As of today, conventional legal wisdom does not yet concede as a practical matter, limits to federal power under the Commerce Clause. Professor A. E. Dick Howard writing of the states and the Supreme Court put the matter succinctly:

> In modern times, generations of law students have been taught that there appeared to be no limits to Congress' commerce power — certainly, none that the Court would declare.
>
> Or so it seemed until the Court's decision in *National League of Cities* v. *Usery* in 1976. Conventional wisdom about the Court and the commerce clause was confounded when a majority of five justices ruled that Congress had exceeded its constitutional authority in subjecting state and local government employees to federal minimum wage and maximum hour requirements.[8]

In the judgment of the *amicus,* unless the holding of this Court in *National League of Cities* is reiterated and clarified, that fragile and tenuous barrier to federal intrusiveness and the federalization process under way

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[8] A. E. Dick Howard, *The States and the Supreme Court,* 45 (National Governor's Association 1980).

today will be swept away as a temporary aberration. The case at bar offers an opportunity to strengthen that barrier.

If, in fact, anything remains of the Constitutional concept of state sovereignty, it should be conserved by this Court. If there are virtues to be perceived in a federal arrangement in which the states and their instrumentalities are understood to have discrete roles and responsibilites and where federal accountability is distinguished from state accountability, these organizing principles should be reiterated and nurtured by this Court.

For the case at bar, the *amicus* urges this Court that the substance of state employer-employee relations, including such matters as hours, wages and the right to strike, should be left in the hands of states as a matter of sovereignty. And these personnel matters also should be left in the hands of states if the states are otherwise to be accountable for the performance and output of such employees. The effectiveness of the federal system in the 1980's and beyond requires no less. Accordingly, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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# No. 80-1925

In The

## Supreme Court of the United States

October Term, 1981

UNITED TRANSPORTATION UNION,

*Petitioner,*

*v.*

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY,

*Respondents.*

On Writ of Certiorari To The
United States Court of Appeals
For the Second Circuit

## BRIEF FOR NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD AS *AMICUS CURIAE*

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## BRIEF FOR NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD AS *AMICUS CURIAE*

## STATEMENT OF INTEREST

The Public Employment Relations Board is the independent agency of the State of New York responsible for the administration of the dispute resolution procedures established by New York's Taylor Law (New York Civil Service Law, Sections 200-214). Resolution of the issues in this case will directly affect the jurisdiction of the Public Employment Relations Board and its administration of the Taylor Law. The Public Employment Relations Board takes no position on whether the operations of the Long Island Railroad Company should be considered an integral or traditional governmental function within the intendment of the *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), nor whether the Taylor Law or the Railway Labor Act

should apply to the employer-employee relations of the Long Island Railroad Company. It is the concern of the Public Employment Relations Board that this case not result in bifurcated federal/state jurisdiction; either the Taylor Law in its entirety or the Railway Labor Act in its entirety should apply.

In view of these interests, the New York State Public Employment Relations Board ("PERB") respectfully submits this brief *amicus curiae*.

## PRELIMINARY STATEMENT

The PERB's concern in this case involves the uncertain scope of the decision of the U.S. Court of Appeals for the Second Circuit under review herein.[1] Did that Court conclude that the Taylor Law, in its entirety, should be applicable to the LIRR and its employees? Or, on the contrary, did the Court determine that only the strike prohibition of the Taylor Law is applicable, while the remainder of that Law is preempted by the Railway Labor Act? Or, did the Court intend some other division of responsibility between federal and state law?

On the one hand, the Second Circuit, in its opinion, states that the "question" presented to it is whether the employees of the Long Island Railroad Company ("LIRR") are subject to the provision in the Taylor Law prohibiting strikes by public employees or to the provision in the Railway Labor Act ("RLA") allowing for such self help. On the other hand, the heart of the Second Circuit's opinion is its interpretation and application of *National League of Cities* v. *Usery*. In its analysis, the Second Circuit recognizes that the "strike" issue is part of a larger concern. Thus, the Court below states: "There is no question but that, as in *National League of Cities*, the operation of the Federal statute directly displaces the State's

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[1] *United Transportation Union* v. *Long Island Railroad Company and Metropolitan Transit Authority*, 634 F2d 19 (1980).

ability to structure its employer-employee relations and to make essential governmental decisions" (at p. 25). In addition, the Second Circuit asserts: "By precluding the State from enforcing this legislation, including its no-strike provision, the Railway Labor Act eliminates a key provision in the State's legislative effort to provide its citizens with continuous public transportation" (at p. 25).

The PERB's concern is in no way theoretical or simply academic. Rather, the Second Circuit's decision has engendered real and immediate confusion and conflict as evidenced by the action of the National Mediation Board ("NMB") in response to that decision. In an Interim Order issued on March 8, 1981 *(Matter of Long Island Railroad Company and Staten Island Rapid Transit Authority,* 8 NMB 89 — File No. C-5045), the NMB viewed the Second Circuit's decision as holding that there is concurrent RLA-Taylor Law jurisdiction. Finding that the Second Circuit, in effect, "destroyed" the RLA's "comprehensive" dispute resolution scheme by "superimposing" upon it the Taylor Law's strike prohibition, the NMB determined that it would withhold mediation services so as to permit the PERB to render its dispute resolution services exclusively. It further concluded, however, that the Second Circuit only examined the mediatory functions of the RLA and its interplay with the Taylor Law, and that the Court gave no indication that it intended to change the representation rights or grievance and arbitration procedures available to LIRR employees under the RLA. As such, the NMB determined that the Second Circuit's decision did not require it to "cede" its jurisdiction in representation disputes, i.e., the choosing of collective bargaining representatives,[2] or in the settlement of minor disputes, i.e. grievance and arbitration procedures.

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[2]Notwithstanding the NMB's Interim Order, the LIRR has filed a decertification petition with the PERB in relation to all of its existing bargaining units. The PERB has advised the parties that it will not process the petition until this Court has decided this case. This is further evidence of the real and immediate confusion and conflict which has been engendered by the Second Circuit's decision.

The PERB does not disagree with the NMB in its view that the RLA is a comprehensive plan which should not be segmented. The Taylor Law, however, is also a comprehensive plan. The PERB believes that the NMB in construing the Second Circuit's decision as requiring that it "cede" only its mediation function to the PERB, created an unworkable scheme which could not have been intended by this Court when it decided *National League of Cities*. This Court there held that the State's ability to structure employer-employee relationships in areas of "integral" or "traditional" governmental functions is an attribute of sovereignty which may not be impaired by Congress. Any bifurcation of authority between the RLA and the Taylor Law will effectively destroy the attribute of sovereignty sought to be shielded under *National League of Cities*, namely, the structuring of employer-employee relationships. The Taylor Law does not structure such relationships simply through prohibiting the strike any more than the RLA does so merely by allowing for such self-help. If the Second Circuit's decision is upheld by this Court, the Taylor Law, in its entirety, should be applicable to the employer-employee relations of the LIRR. PERB respectfully submits that the only appropriate alternative to such result is a determination that no part of the Taylor Law — including the strike prohibition — should be applicable to such relations.

## SUMMARY OF ARGUMENT

The Taylor Law is a comprehensive, integrated scheme of regulation, the components of which cannot be segregated and still have meaning. The provision of that Law prohibiting strikes is one part of a unified State policy structuring public employer-employee relations. The various dispute resolution procedures contained in that Law are intended to provide an effective alternative to the strike. To continue the prohibition against the strike while denying the applicability of the remainder of the Taylor Law would destroy the balance which

the State Legislature intended when it enacted the Taylor Law. Either the entire policy of the State regarding public employer-employee relations should be shielded from federal interference pursuant to *National League of Cities* v. *Usery*, or no part of it — including the strike prohibition — should be shielded. This Court should not countenance a result which would leave two distinct law-making sources, based on fundamentally different premises, to govern separate aspects of the employer-employee relations of the LIRR.

## ARGUMENT

**The Taylor Law, like the RLA, is a comprehensive, integrated scheme of regulation of employer-employee relationships which can be effectively administered only on a unified basis. Whichever statute governs the labor relations of the LIRR should govern in its entirety to the exclusion of the other.**

The Taylor Law represents a significant and far-reaching change in New York's public policy regarding strikes by public employees. Prior to its enactment in 1967,[3] the only statute dealing with the subject — the Condon-Wadlin Act[4] — simply prohibited strikes and mandated severe penalties for its violation. In large measure, the Condon-Wadlin Act proved unenforceable and was generally recognized as an inadequate response to the needs of public employees.

In 1966, Governor Rockefeller requested a distinguished group of experts, popularly called the Taylor Committee, to "make legislative proposals for protecting the public against

[3]New York Laws of 1967, Chapter 392, codified as New York Civil Service Law ("CSL") Sections 200-214.

[4]New York Laws of 1947, Chapter 391. Strikes by public employees were illegal under the common law of New York (see *Petrucci* v. *Hogan*, 27 NYS2d 718 (1941) and *New York City Transit Authority* v. *Loos*, 2 Misc.2d 733 (1956), aff'd 3 AD2d 740 (1957).

the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees."[5] The Taylor Committee summarized its assessment of the problem as follows:

> Despite many complexities, we believe it is both feasible and desirable to develop a system of effective collective negotiation in the public service. This can be achieved in a manner which is consonant with the orderly functioning of a democratic government. It cannot be achieved by transferring collective bargaining as practiced in the private enterprise sector into the governmental sector. New procedures have to be created.[6]

The Condon-Wadlin Act was repealed and new procedures were embodied in the Taylor Law. In accordance with the recommendations of the Taylor Committee, the Taylor Law contained the following important elements:

1. Public employees were granted the right to collective bargaining through representatives of their own choosing and public employers were required to bargain collectively with the duly recognized or certified representatives;

2. Procedures were established to provide a dependable representation status for recognized or certified employee organizations;

3. Criteria for the definition of appropriate bargaining units were established "which square with the characteristics of the public employment relationship and with the joint responsibility of the employees and

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[5]The Governor's announcement is quoted in *Governor's Committee on Public Employee Relations, Final Report, March 31, 1966*, p. 9 (hereinafter, "Final Report"). The five experts were George W. Taylor, Chairman; E. Wight Bakke, David L. Cole, John T. Dunlop and Frederick H. Harbison.

[6]Final Report, p. 19.

administrators for the effective performance of their mission, namely, to serve the public";[7]

4. Dispute settlement procedures were established for the orderly resolution of impasses in collective negotiations;

5. A public employment relations board was created to assist in resolving representation and negotiation disputes between public employers and public employees; and

6. The prohibition against strikes was continued and penalties were provided for violation of such prohibition.

One basic change in the Taylor Law occured in 1969 when it was amended to incorporate improper labor practices by public employers and employee organizations and to empower the PERB to establish procedures for the prevention of such practices.[8]

It is submitted that the following analysis will make clear that the Taylor Law's component parts — its strike prohibition, its impasse resolution procedures and its improper practice and representation provisions — are all intimately intertwined and form a unitary scheme of dispute resolution. As the Taylor Committee stated: "The avoidance of the strike is substantially the perfection of procedures and policies to provide an effective alternative to conflict."[9]

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[7]Final Report, p. 23.

[8]New York Laws of 1969, Chapter 24, codified as New York Civil Service Law §§205.5(d) and 209-a.

[9]Final Report, p. 33.

***Impasse Resolution Procedures***

The impasse resolution procedures developed under the Taylor Law are an integral and essential component of the strike prohibition. One purpose of the Taylor Law is to provide an "effective alternative" to the strike through its impasse resolution procedures. Without such procedures, the basic intent of the Legislature in continuing the strike prohibition is destroyed.

This Court has previously had occasion to recognize "the important and often-noted differences in the nature of collective bargaining in the public and private sectors."[10] Those differences need not here be recounted but they do exist if only because "government is not just another industry."[11] These differences, in large measure, underlie the continuing search for an acceptable answer to the problem of "finality" in public sector labor negotiations. When bargaining does not produce an agreement, what methods or mechanisms for the resolution of impasses in collective bargaining in the public sector are feasible and desirable other than the strike?

The Taylor Law has mustered an arsenal of persuasive weapons to assist the parties to reach agreement. Thus, if an impasse is determined to exist, the PERB appoints a mediator to assist the parties (CSL §209.3(a)). If the impasse continues, the PERB appoints a factfinding board, with the power, *inter alia*, to make public recommendations for the resolution of the dispute (CSL §209.3(b)). Such public reports and recommendations have a special relevance when the public's business is involved. Aside from the public's right to be informed on the

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[10] *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 227 (1977).

[11] H. Wellington and R. Winter, THE UNIONS AND THE CITIES (1971), p. 202.

issues, they may provide a basis to crystallize thoughtful public opinion and news media comment. If the factfinding report does not resolve the dispute, the PERB has the power "to take whatever steps it deems appropriate to resolve the dispute" including making recommendations for settlement, providing further conciliation efforts and assistance in providing for voluntary arbitration (CSL §209.3(d)). The PERB often provides post-factfinding mediation which can involve a more aggressive intervention strategy by the neutral. Where the strike is prohibited, the mediator cannot simply walk away from the table and allow the strike to occur. Intensive, ongoing conciliation efforts are an essential aspect of the impasse resolution process.

In view of the strike prohibition, the Taylor Law's impasse procedures must be flexible enough to accommodate the specific needs of the parties. Thus, the Taylor Law mandates no single procedure or style of dispute settlement. In its administration of this statute, the PERB has often blurred the distinction between mediation and factfinding by assigning a factfinder at the first stage of the impasse under the assumption that he or she will attempt to mediate the dispute prior to conducting a formal hearing. This procedure may reduce the parties' incentive to delay and to hold back concessions. In addition to these PERB-administered procedures, the Taylor Law encourages public employers and employee organizations to agree to their own impasse resolution procedures. Such agreed-upon procedures must fail to achieve a settlement before the PERB will render assistance (CSL §209.2). Parties are free, therefore, to experiment and revise procedures in light of their experience.

Only if all these efforts fail is the legislative body of the public employer empowered, after public hearing, to act as the final arbiter by taking "such action as it deems to be in the

public interest, including the interest of the public employees involved" (CSL §209.3(e)).[12]

Contrary to the private sector, the Taylor Law procedures do not rest upon the basic assumption that the availability of the strike weapon is essential to induce compromise and ultimate agreement by the parties. The varied methods of persuasion developed under the Taylor Law, together with PERB's familiarity with the disputants and their disputes, as well as political activity by employees short of the strike, have proven to be a feasible alternative to the strike.[13] To continue the strike prohibition while denying the applicability of these procedures would destroy the structure that the Legislature intended to establish. This Court should not apply *National League of Cities* so as to shield the strike prohibition if the impasse procedures of the Taylor Law are not applicable.

***Improper Employer and Employee Organization Practices***

The improper practice powers of the PERB are an integral component of the Taylor Law structure and cannot be segregated from the PERB's other dispute resolution powers. By virtue of its power to remedy improper practices, PERB,

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[12]Final Report, p. 39:

"It is ultimately the legislature and the political process which has to balance the interests of public employees with the rest of the community, to relate the compensation of public employees to the tax rate, and to appraise the extent and quality of public services and the efficiency of their performance to the aspirations of public employees. The methods of persuasion and political activity, rather than the strike, comport with our institutions and traditions as means to resolve such conflicts of interest. It is these methods, moreover, that have been utilized by the wide variety of employee organizations which are indigenous to public employment."

[13]Compulsory binding arbitration, as the final step in the resolution of impasses involving police and firefighters was added to the Taylor Law in 1974 (Chapters 724 and 725 of the Laws of 1974). In the same year, the role of the legislative bodies of school districts as final arbiters was withdrawn.

*inter alia,* regulates and defines the conduct and subject matter of collective negotiations. The availability of the improper practice mechanism and the parties' knowledge that PERB stands ready to affirmatively remedy breaches of proper conduct serve as significant deterrents against activity that might otherwise foment an illegal strike. The Legislature, in amending the Taylor Law to provide for improper practice procedures and remedies, recognized the need to provide balance if its strike prohibition was to be effective:

> The new amendments also sought to correct a number of problems which, it was felt, contributed to the occurrence of strikes. The law codified improper employer and employee practices and specifying [sic] remedies so as to enable PERB, acting on the request of a party, to correct an improper advantage gained by a party, and to encourage proper and orderly negotiations.* * *[14]

In regard to improper practices, the Legislature was especially concerned that distinctions be recognized between labor relations in the public sector and labor relations in the private sector.[15] Thus, §209-a.3 of the Taylor Law provides:

> Application. In applying this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent.

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[14] *The Select Joint Legislative Committee on Public Employee Relations, 1969 Report,* p. 12 (hereinafter "1969 Report").

[15] This concern is also reflected in the Legislature's use of terminology which differs from that used in the private sector. Thus, the Taylor Law's prohibited "improper practices" parallel but are not identical to the "unfair labor practices" prohibited under the National Labor Relations Act. Similarly, the Legislature's use of the term "collective negotiations" rather than "collective bargaining" was both intentional and significant. 1969 Report, at 14-15.

These distinctions are particularly relevant in a recurring area of dispute in collective negotiations under the Taylor Law, involving the line to be drawn between those subjects which are "terms and conditions of employment" that must be negotiated by the public employer with the union representing the employees and those matters of policy or management which should be reserved to the normal, political decision-making process of the public employer. In short, in the public sector the question of the proper scope of bargaining is intimately related to the fact that "government is not just another industry." How can bilateral decision-making be reconciled with the responsibilty of the government to the general public?

In an early decision,[16] the PERB outlined the public sector considerations that dictate a special response to this issue:

> A public employer exists to provide certain services to its constituents, be it police protection, sanitation or, as in the case of the employer herein, education. Of necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees. [footnote omitted] Here there must be noted a substantial difference between private employers and public employers, for the latter "owe a very special obligation to the public not owed by private employers . . ." [*Civil Service Employees Association* v. *Helsby*, 21 NY2d 541 (1968)]

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[16] *City School District of New Rochelle*, 4 PERB ¶3060 (1971).

The public sector test of negotiability formulated by the PERB on the basis of these special considerations has been upheld by the New York courts.[17]

It is by virtue of the PERB's authority to establish procedures for the prevention of improper practices, including the refusal to negotiate in good faith, that PERB is empowered to decide scope of bargaining issues. Improper practice charges raising such issues are filed during the course of collective negotiations. Because prompt resolution of these questions is essential to the maintenance of a peaceful and orderly collective negotiation process, the PERB has adopted special rules governing the expedited determination of such cases.[18] It is evident that if the strike weapon is not available to employees, effective and equitable dispute resolution requires the exercise by PERB of its power to prevent improper practices.

If this Court applies *National League of Cities* in such manner as to shield only the strike prohibition of the Taylor Law, then the improper practice jurisdiction of the PERB would not be applicable to the LIRR and its employees. This result would destroy the balance that the Legislature intended to establish when it sought to prevent improper practices which contribute to the occurrence of strikes. Many types of improper practices, in addition to those involving scope of bargaining issues, such as refusals to bargain in good faith, and coercive and discriminatory practices, can be directly related to the negotiation process and should, therefore, be dealt with by the PERB if the strike prohibition of the Taylor Law applies. On the other hand, the PERB believes that the strike prohibition

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[17] *West Irondequoit Teachers Assoc.* v. *Helsby*, 35 NY2d 46 (1974); *Saratoga Springs City School District* v. *PERB*, 68 AD2d 202, 209 (3rd Dept., 1979), mt. lv. app. den. 47 NY2d 711 (1979).

[18] Official Codes, Rules and Regulations of the State of New York, Title 4, §204.4.

ought not to be applicable if the PERB's improper practice procedures are not available to the affected employees.

***Determination of Representation Status***

The Taylor Committee phrased a basic premise of the Taylor Law in these words:

> "It is elementary justice to assure public employees, who are estopped from using the strike, that they have the right to negotiate collectively . . . If collective negotiations are to resolve issues in the public employment relationship peacefully, the foundation for that result must be laid in effective procedures to establish representation status for the organizations which conduct the negotiations on behalf of the employees. That foundation has not been laid by statute in New York State."[19]

The Taylor Law provides effective procedures to establish a dependable representation status. They authorize recognition of an employee organization by the public employer in the absence of a dispute, and certification by the PERB where there is a dispute. The employees' choice of employee organization as their representative must be ascertained by evidence of majority status, to be established by conducting an election, if necessary (CSL §207.2). To be recognized or certified, the employee organization must affirm that it does not assert the right to strike (CSL §207.3). This "no strike" affirmation is not a meaningless formality. PERB has dismissed a certification petition filed by an employee organization when, during the pendency of such petition, the organization violated its affirmation.[20] Of larger significance, the "no strike" affirmation, as a prerequisite to representation status, goes hand

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[19]Final Report, p. 20.

[20]*State of New York and Committee of Interns and Residents, et al.*, 12 PERB ¶3092 (1979).

in hand with the prohibition against strikes, and sets the tone for subsequent negotiations.

In determining the representation status of the employee organization, the appropriate bargaining unit must be defined in accordance with specified statutory criteria:

> (a) the definition of the unit shall correspond to a community of interest among the employees to be included in the unit;
>
> (b) the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to the terms and conditions of employment upon which the employees desire to negotiate; and
>
> (c) the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.[21]

These criteria mandate consideration of the special characteristics of the public employment relationship and the joint responsibility of both employees and employers to serve the public in an effective and peaceful manner. These factors differ markedly from those under the RLA. Under that Act:

> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act.[22]

Due to the differing mandates of the Taylor Law and RLA criteria, the respective approaches of the PERB and the NMB to the question of unit definition must necessarily differ. Based upon the RLA criteria, the NMB grants each craft or historical class of employees its own representative for bargaining

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[21]CSL §207.1.

[22]RLA Sec. 2, Fourth.

purposes. Thus the NMB has established some 20 crafts or classes into which it units the employees of rail carriers.[23] PERB, on the other hand, in response to the Taylor Law criteria, has followed a policy which generally favors larger units along merged occupational lines, at least where there exists no prior negotiating history between the parties.[24] By avoiding the proliferation of smaller units, PERB's policy affords public employers the administrative convenience needed to serve the public, and enables them to maintain some semblance of uniformity in benefits and working conditions. From the standpoint of the public employees, PERB's policy is tied directly to the fact that they lack the right to strike. Where, as under the RLA, the strike weapon is available, smaller units can adequately serve the needs of employees. The economic power wielded by each such unit can have a formidable impact upon the employer. Where, however, as under the Taylor Law, employees are prohibited from striking, their goals can be obtained only through negotiations and resort to the political process. Larger units, by virtue of their size, can exert greater political pressure and may, therefore, be better suited to pursue the employees' demands more effectively.

The PERB does not intend to imply in any way that the public sector considerations underlying the Taylor Law criteria are more appropriate for the operations of the LIRR than the private sector considerations underlying the RLA criteria. Neither is it the PERB's position that other factors, such as the

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[23]National Mediation Board, *Annual Report for the Fiscal Year Ended September 30, 1979*, pp. 24-25.

[24]*State of New York*, 1 PERB ¶399.85 (1968); *New York State Thruway*, 1 PERB ¶399.81 (1968); *Civil Service Employees Association* v. *Helsby*, 32 AD2d 131 (1969), aff'd 25 NY2d 842 (1969). See also Crowley, *The Resolution of Representation Status Disputes Under the Taylor Law*, 37 Fordham Law Review 517 (1969); Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 Michigan Law Review 1001 (1969).

past history of bargaining between these parties, would not be relevant should PERB, as a result of this case, hear the pending representation petition filed with it by the LIRR (see fn. 2, supra.). The PERB simply desires to point out that such criteria have relevance only in the context of the particular labor relations scheme of which they are a part, and cannot be separated from the differing considerations underlying those structures.

The statutory provisions for establishing representation status, therefore, are an integral component of the Taylor Law scheme of regulation. The policy underlying the Taylor Law will be severely impaired by a regulatory scheme which leaves important representation issues to be resolved by the NMB while permitting related disputes to be determined by the PERB. It is respectfully submitted that this Court should not exclude this important area of dispute resolution from the reach of its analysis.

* * * * *

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 241-2 (1959), this Court observed:

> In determining the extent to which state regulation must yield to subordinating federal authority, * * *[w]e have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing remedial schemes.

The PERB respectfully submits that a comparable concern for the potential conflict inherent in allowing two law-making sources to govern is warranted in determining the extent to which, if at all, the provisions of the RLA are constitutionally invalid under the reasoning of *National League of Cities* v. *Usery*, if applied to the employer-employee relations of the LIRR.

## CONCLUSION

For the foregoing reasons, whichever statute, federal or state, is determined by this Court to govern the employer-employee relations of the LIRR, such statute should be permitted to govern in its entirety to the exclusion of the other.

Respectfully submitted,

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No. 80-1925

# In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION, PETITIONER

*v.*

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

The Long Island Railroad is a common carrier, currently owned and operated by an agency of the State of New York, that is primarily engaged in commuter service. The question presented is whether the Railway Labor Act may, consistent with the Tenth Amendment, secure to employees of the railroad the right to strike denied them by state law.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### INTEREST OF THE UNITED STATES

This case involves the constitutionality of a federal statute, the Railway Labor Act, as applied to employees of a railroad owned by an agency of the State of New York. The Secretary of Labor is the federal official responsible for enforcing many federal labor laws and for developing and maintaining a coherent national labor policy. See 29 U.S.C. 551. The National Mediation Board is the federal agency responsible for administration of the Railway Labor Act. See 45 U.S.C. 155. Resolution of the issues raised here will directly affect the jurisdiction of the NMB in its administration of the Act and could affect the responsibilities of the Secretary under other

statutes. The United States, which participated as amicus curiae in the court of appeals, accordingly has a substantial interest in the question presented in this case.[1]

## STATEMENT

This case arose from a labor dispute between employees of the Long Island Railroad (LIRR), represented by petitioner United Transportation Union (UTU), and respondents LIRR and the Metropolitan Transportation Authority (MTA), the New York State agency that now owns and operates the LIRR. Petitioner UTU sought declaratory relief establishing that LIRR employees are covered by the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, and accordingly possess the right to strike established therein. Petitioner also sought injunctive relief barring enforcement of New York's "Taylor Law," N.Y. Civ. Serv. Law § 200 *et seq.* (McKinney 1973 & Supp. 1980), which prohibits public employee strikes, on the ground that the RLA preempts the state law. The district court granted summary judgment to petitioner (Pet. App. 29a-46a) but the court of appeals reversed (Pet. App. 1a-25a), holding that application of the RLA to secure the right to strike to the LIRR's employees is inconsistent with the Tenth Amendment.

1. The LIRR is a common carrier providing service to five counties within the New York metropolitan area. The railroad was founded in the early nineteenth century and remained in private hands until 1966, when its stock was acquired by an agency of the State of New York from the Pennsylvania Railroad. The LIRR is now owned and operated by the MTA, also an entity of state government.

The LIRR is predominantly a commuter railroad, providing passenger service between Nassau and Suffolk

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[1] Although the constitutionality of provisions of the Railway Labor Act, as applied to the Long Island Railroad, was "drawn in question" in this case, neither the district court nor the court of appeals certified this fact to the Attorney General, as required by 28 U.S.C. 2403, so as to permit intervention by the United States.

counties, outside New York City, and the railroad's western terminus in Manhattan, in New York City. The most distant point served by the LIRR, however, is more than a hundred miles from Manhattan, and such a journey takes about three hours. In addition to passenger service, the LIRR provides a modest amount of freight service and is the only carrier of freight by rail within its service area. As a freight carrier, the LIRR participates in interstate commerce by interchange of freight cars with other connecting carriers (Pet. App. 3a-4a, 10a, 34a-35a; see also *Moody's Transportation Manual* 682-684 (1980)).

As a result of its participation in interstate freight shipments, the LIRR is a carrier within the meaning of the Interstate Commerce Act, 49 U.S.C. (Supp. III) 10501(a); *Brotherhood of Locomotive Engineers* v. *Staten Island Rapid Transit Operating Auth.*, Finance Dkt. No. 29011 (ICC Nov. 8, 1979). The railroad has historically considered itself subject to the Interstate Commerce Act, filing reports thereunder, and to other federal railroad legislation applicable to such carriers, including the Railway Labor Act (Pet. App. 10a, 35a-36a).[2] Indeed, the LIRR invoked the collective bargaining and mediation procedures of the National Mediation Board (NMB) in the very labor dispute that led to this litigation (*id.* at 36a).

2. Petitioner commenced this action in the United States District Court for the Eastern District of New York on December 7, 1979, at a time when the collective bargaining and mediation procedures prescribed by the RLA for resolution of the labor dispute between its members and the railroad were about to be exhausted.[3] The

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[2] The entire operation of the LIRR is subject to the RLA by virtue of its status as a carrier within the meaning of the Interstate Commerce Act. 45 U.S.C. 151.

[3] The procedures of the Railway Labor Act were summarized in *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969):

> The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect

following day, UTU members began a strike against the LIRR. On December 14, pursuant to the NMB's certification that the strike "threaten[ed] substantially to interrupt interstate commerce to a degree such as to deprive • • • [a] section of the country of essential transportation," the President established an Emergency Board pursuant to the RLA, 45 U.S.C. 160, thereby triggering a "cooling off" period of up to 60 days (Pet. App. 4a, 30a-31a).

The LIRR employees thereupon returned to work. On January 17, 1980, respondents moved to dismiss this action for want of a justiciable "case or controversy," noting that the LIRR, despite its acquisition by the MTA, remained organized as a private stock corporation, the employees of which were not, as a matter of state law, covered by the Taylor Law. See N.Y. Pub. Auth. Law § 1265(9)(a) (McKinney 1970); N.Y. Civ. Serv. Law §§ 201(6)(a), (7)(a) and (8), and 210(1) (McKinney 1973 & Supp. 1980). Respondents argued that the Taylor Law was inapplicable on its face and asserted that they had no intention of invoking it (Pet. App. 31a).

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a change of rates of pay, rules, or working conditions must give advance written notice. § 6 [45 U.S.C. 156]. The parties must confer, § 2 Second [45 U.S.C. 152 Second], and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First [45 U.S.C. 155 First]. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7 [45 U.S.C. 155 First, 157]. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10 [45 U.S.C. 160]. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10 [45 U.S.C. 152 Seventh, 155 First, 156, 160].

Three weeks later, however, as the end of the "cooling off" period approached, respondents changed their posture completely by reorganizing the LIRR as a public benefit subsidiary corporation of the MTA, thereby bringing the railroad's employees within the coverage of the Taylor Law. See N.Y. Pub. Auth. Law § 1265(9)(a) (McKinney 1970). Petitioner then sought, but was denied, a temporary restraining order barring enforcement of the Taylor Law against its members. The next day, February 13, 1980, the LIRR brought suit in state court under the Taylor Law, seeking an injunction against resumption of the strike (Pet. App. 31a).[4]

3. The district court granted petitioner's motion for summary judgment (Pet. App. 29a-46a). Relying on factual statements in the LIRR's own papers, the court determined at the outset that the LIRR is a carrier subject to the RLA (*id.* at 33a-36a). Citing *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), and *California* v. *Taylor*, 353 U.S. 553 (1957), the court concluded that the RLA secured the right to strike to the LIRR's employees, notwithstanding contrary state law and the state's ownership of the railroad (Pet. App. 36a-39a). The court characterized the Taylor Law's "abridgement of the right to strike * * * [as] a direct assault upon the heart of the federal scheme of labor relations in the railway industry" and held that the Supremacy Clause barred its application to petitioner's members (*id.* at 39a).

The district court also rejected the LIRR's contention that the Tenth Amendment, as construed in *National*

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[4] Petitioner removed the state court action to the United States District Court for the Southern District of New York and then sought to have it transferred to the Eastern District federal court to be consolidated with the instant case. Instead, the Southern District federal court remanded the case to state court (Pet. App. 32a).

*League of Cities* v. *Usery*, 426 U.S. 833 (1976), precluded application of the RLA to a state-owned railroad. The court noted that this Court in *National League of Cities* had affirmed the continuing validity of *United States* v. *California*, 297 U.S. 175 (1936), and *California* v. *Taylor*, *supra*, which had upheld the assertion of federal authority over state railroads, and it distinguished commuter rail service from the state activities canvassed in *National League of Cities* (Pet. App. 38a n.4).[5]

4. The court of appeals reversed (Pet. App. 1a-25a). The court of appeals agreed with the district court that the RLA is applicable to the LIRR (*id.* at 8a-10a) and that application of the RLA, if constitutional, would preempt the Taylor Law's strike prohibition (*id.* at 10a, 24a). The court of appeals concluded, however, that application of the RLA to vest LIRR workers with the right to strike violates the Tenth Amendment as construed in *National League of Cities*. The court employed a three step analysis (*id.* at 11a-13a), extracted from the Court's opinion and Justice Blackmun's concurring opinion in *National League of Cities*, inquiring: (1) whether application of the RLA would displace "essential government decisions" (*id.* at 13a-15a), (2) whether the operation of the LIRR is an "integral government function" (*id.* at 15a-22a), and (3) whether the federal government's interest in application of the RLA is

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[5] Although the district court granted the requested injunction against prosecution of the pending state court action to enforce the Taylor Law, it also enjoined any strike by petitioner's members pending respondents' appeal, so as to preserve the status quo in all respects (Pet. App. 45a). The court held (*id.* at 39a-45a) that the Anti-Injunction Act, 28 U.S.C. 2283, did not apply because injunctive relief was necessary to effectuate the court's judgment. This issue, which was not addressed by the court of appeals, is not before this Court.

The labor dispute that gave rise to this action was settled on April 11, 1980, prior to oral argument before the court of appeals (Pet. App. 6a n.6).

"demonstrably greater" than the state's interest in avoiding strikes (*id.* at 22a-25a).

The court of appeals first held that the RLA necessarily "displaces the State's ability * * * to make essential governmental decisions" because "[i]n enacting the Taylor Law, New York State made a determination that in order to protect the public it must assure the orderly and uninterrupted operations and functions of government by prohibiting strikes by public employees" and because the Taylor Law is "a key provision in the state's legislative effort to provide its citizens with continuous public transportation" (Pet. App. 14a). The court also noted the adverse effect a strike would have on the economy of the New York metropolitan area and the increased leverage the right to strike provides workers in wage negotiations, concluding that application of the RLA "deprives the States of the right to make 'fundamental employment decisions' that are essential to their 'separate and independent existence'" (*id.* at 15a, quoting *National League of Cities, supra*, 426 U.S. at 851).

Second, notwithstanding the Court's refusal in *National League of Cities* (426 U.S. at 854 n.18) to overrule *United States* v. *California*, which upheld application of the federal Safety Appliance Act to California's publicly-owned State Belt Railroad, the court of appeals concluded that the operation of the LIRR constitutes an "integral government function." The court below distinguished *United States* v. *California* on the ground that California's State Belt Railroad provided only freight service, whereas the "local passenger transportation" provided by the LIRR had, in the court's view, "come to be supplied primarily by state and local governments" (Pet. App. 17a; footnote omitted). The court remarked that passenger transportation is a service "that the state and local governments are particularly suited to provide because of the community-wide need," a service "they have come to provide by a process of economic elimination of private suppliers," and a service "of much more importance to the

public, in several respects, than was the state-operated freight line in *United States* v. *California, supra*" (*id.* at 18a). The court thus held that the scope of state and local government services shielded from federal legislation by the Tenth Amendment is not limited to the traditional range of governmental functions (*id.* at 18a-22a), but is instead dependent on the current "importance of a public service" (*id.* at 18a).

Finally, the court of appeals concluded (Pet. App. 22a-25a) that the federal interest in application of the RLA to the LIRR is not "demonstrably greater" than the state's countervailing interest in preventing strikes. This conclusion rested on two observations: first, that the ultimate purposes—*i.e.*, maintenance of labor peace and continuity of service—of the Taylor Law and the RLA are consistent,[6] and second, that New York has a greater interest in resolution of disputes affecting the LIRR's commuter service than does the United States.[7]

5. Subsequent to this Court's grant of certiorari to review the court of appeals' decision in this case, Congress enacted amendments to the Railway Labor Act that directly affect the analysis of the issue presented. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Section 1157, *reprinted in* 127 Cong. Rec. H5532 (daily ed. July 29, 1981). These amendments, which are designed to "provide for public accountability in labor disputes involving publicly operated commuter service" (H.R. Rep. No. 97-153, 97th Cong., 1st Sess. 3

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[6] The court of appeals observed that the Taylor Law preserves the right of collective bargaining secured by the RLA, and it remarked that the conflict between the two schemes is thus much less acute than that at issue in *California* v. *Taylor, supra*, where the state law prohibiting strikes was labeled by this Court (353 U.S. at 560) as the "antithesis" of the RLA (Pet. App. 24a).

[7] The court of appeals acknowledged (Pet. App. 24a) that the "federal government has the prevailing interest in the operation of the LIRR's freight service," but it concluded that commuter service constitutes the predominant portion of the LIRR's operations.

(1981)),[8] add a new Section 9A to the RLA, the provisions of which substantially enhance the ability of publicly owned and operated commuter railroads to avoid interruptions of service stemming from labor disputes.[9]

The amendments provide that whenever the National Mediation Board is unable to resolve a labor dispute through the conciliation procedures prescribed by the RLA (see note 3, *supra*), the Governor of any state served by the carrier, the publicly owned commuter rail authority, or any union involved may request establishment of an Emergency Board to investigate and report upon the dispute. Section 9A(b). Upon receipt of any such request, the President is directed to appoint a board,

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[8] H.R. Rep. No. 97-153 accompanied H.R. 3559, 97th Cong., 1st Sess. (1981). Section 609 of that bill incorporated amendments to the RLA identical to those actually enacted as part of the Omnibus Budget Reconciliation Act of 1981. Compare H.R. Rep. No. 97-153, *supra*, at 36, 100, with 127 Cong. Rec. H5532 (daily ed. July 29, 1981). The legislative history of H.R. 3559 was incorporated by reference in the House version of the budget reconciliation bill, see H.R. Rep. No. 97-158, 97th Cong., 1st Sess., Vol. II, 438 (1981), and the House version of the budget reconciliation bill was, in this respect, ultimately adopted by the Conference Committee and enacted into law. See 127 Cong. Rec. S9065 (daily ed. July 31, 1981) (Conf. Rep.).

[9] The Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, Section 1135(a)(3), *reprinted in* 127 Cong. Rec. H5521 (daily ed. July 29, 1981), defines a "commuter authority" as

> any State, local, or regional authority, corporation, or other entity established for purposes of providing commuter service, * * * *includ[ing] the Metropolitan Transportation Authority* * * * any successor agencies, and any entity created by one or more such agencies for the purpose of operating, or contracting for the operation of, commuter service. [Emphasis added.]

The Act also provides (Section 1135(a)(4)) that

> "Commuter service" means short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations.

unless he has already done so in the exercise of his discretionary power in response to a report by the NMB, as provided under the long-standing procedures of the RLA, 45 U.S.C. 160 (see page 4 and note 3, *supra*). Section 9A(b) and (c). Once an Emergency Board is created, whether at the request of an interested party or the Governor, or in the exercise of the President's discretion, no strike is permitted during the ensuing 120 days. Section 9A(c)(1) and (2).[10] As in the case of other rail disputes, the Emergency Board is directed to render its report regarding a labor dispute involving a publicly owned and operated commuter authority within 30 days. See 127 Cong. Rec. S9065 (daily ed. July 31, 1981) (Conf. Rep.); 45 U.S.C. 160. However, when 60 days have elapsed from the creation of the Emergency Board, without resolution of the dispute, instead of allowing a strike to commence (see note 10, *supra*) the amendments require the NMB to conduct a public hearing at which each party to the dispute must justify its failure to abide by the Emergency Board's settlement recommendations. Section 9A(d).

The new statute also provides that any party to the dispute, or the Governor of a state served by the commuter carrier, may secure, upon request, appointment of a second Emergency Board, when the initial 120-day "cooling off" period expires without a settlement. Section 9A(e). Thereafter, each party is required to submit a final statement of proposed terms for settlement within 30 days, and the second board is directed to report to the President, in another 30 days, its selection of the most reasonable offer. Section 9A(f) and (g). During this process and for 60 days thereafter no strike is permitted. Section 9A(h). Thus the "cooling off" period may last as

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[10] Under the generally applicable provisions of the RLA, the period during which "no change, except by agreement, shall be made by the parties to the controversy" extends from the creation of the Emergency Board through 30 days after it has rendered its report—a maximum of 60 days overall. 45 U.S.C. 160.

long as 240 days beyond the end of the NMB's mediation procedures.

The 1981 amendments provide substantial incentives to each party to accept the proposal determined to be most reasonable by the second Emergency Board. Should the union strike after refusing to accept the carrier's offer, selected as most reasonable by the board, its members are denied benefits under the Railroad Unemployment Insurance Act for the duration of the strike. Section 9A(i). Conversely, if it is the carrier's refusal to yield that prevents a settlement, the carrier is precluded from taking advantage of any mutual assistance agreement among rail carriers. Section 9A(j).

## SUMMARY OF ARGUMENT

The application of the Railway Labor Act to vest employees of the LIRR with the right to strike in certain narrow circumstances does not violate the Tenth Amendment. In *National League of Cities* v. *Usery*, 426 U.S. 833, 845, 852 (1976), this Court held that federal legislation enacted pursuant to the Commerce Clause ordinarily may not "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" so as to deprive a state of "functions essential to separate and independent existence." Although the Court did not exhaustively catalogue the protected state functions, it identified one function as unprotected—the operation of a railroad engaged in common carriage in interstate commerce. *Id.* at 854 n.18. The decision below disregards this guidance.

A. Operation of a common carrier such as the Long Island Railroad is not a traditional function of state government. The railway industry in the United States has historically been (and still remains) the domain of private enterprise, and as such has been the subject of comprehensive federal regulation for over a century. This regulatory framework has been consistently upheld by this Court as a permissible exercise of the commerce power, and the Railway Labor Act is a long-standing and integral part of the congressional scheme.

The LIRR represents no exception to the railroad industry pattern. Privately owned throughout most of its existence, the LIRR freely acknowledged that it was subject to federal legislation, including the RLA, applicable to railroads participating in interstate commerce, until it reversed its position in the course of litigating this case. In these circumstances, the expansion of state activities to encompass the operation of the LIRR cannot insulate the railroad's employees from the protections granted by Congress in the RLA.

In reaching a contrary conclusion, the court of appeals relied on the erroneous perception that the service provided by the LIRR is of a kind provided almost exclusively by publicly owned and operated carriers. But the court failed to recognize that the LIRR, despite the evolving character of its operations, remains a railroad—an integral part of the interstate railroad industry and plainly distinguishable from conventional intraurban transit systems.

B. The Railway Labor Act does not, in any event, displace fundamental state decisions. Unlike the Fair Labor Standards Act, considered in *National League of Cities*, the RLA imposes no substantive requirements upon state entities. Rather, it merely prescribes a set of procedures, applicable throughout the railroad industry, that are designed to resolve labor disputes amicably and to avoid work stoppages detrimental to interstate commerce.

Moreover, the purposes of the RLA are fully consistent with the State's Taylor Law, and many of the provisions of the two schemes are similar. Although the RLA protects the right to strike denied by state law, it requires exhaustion of "interminable" procedures (*Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969)) before that right may be exercised. Indeed, this Court has recognized that the scheme prescribed by the RLA is generally a more effective means of avoiding interruptions in rail service than state law prohibitions upon strikes. *California* v. *Taylor*, 353 U.S. 553, 566

(1957). Accordingly, the RLA effects little, if any, meaningful intrusion upon state decision-making. Any intrusive effect has been further reduced by the recent amendments to the RLA, which vest publicly owned and operated commuter railroads, including the LIRR, with the right to invoke a "cooling-off" period of as much as 240 days after the exhaustion of mediation processes, during which no strike may occur, and which provide additional incentives for avoidance of work stoppages.

## ARGUMENT

### APPLICATION OF THE RAILWAY LABOR ACT TO EMPLOYEES OF THE LONG ISLAND RAILROAD DOES NOT VIOLATE THE TENTH AMENDMENT

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court held that the 1974 amendments to the Fair Labor Standards Act (FLSA) applying the minimum wage, overtime pay and maximum hour provisions of that Act to "almost all public employees employed by the States and by their various political subdivisions" (*id.* at 836) were unconstitutional. Observing that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime" (*id.* at 845), the Court noted that the 1974 FLSA amendments "directly supplant[] the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment." *Id.* at 848. The Court accordingly concluded that "the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*id.* at 852) and to deprive the states of " 'functions essential to separate and independent exist-

ence'" (*id.* at 845, quoting *Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911), and *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)), thereby "'impair[ing] the States' integrity or their ability to function effectively in a federal system'" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 843, quoting *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975)). Congress was barred by the Tenth Amendment from exercising its plenary power under the Commerce Clause in such circumstances, lest "'the National Government * * * devour the essentials of state sovereignty.'" 426 U.S. at 855, quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting).

Just last Term the Court recapitulated the holding of *National League of Cities* in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981). The Court stated (slip op. 21 (footnote omitted; emphasis in original)):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.* at 852.

Even when these three requirements are met, a Tenth Amendment challenge to legislation under the Commerce Clause will sometimes fail, the Court noted, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 21 n.29.

In our view, application of the foregoing principles to the facts of this case reveals that the court of ap-

peals' decision constitutes an unwarranted extension of the holding in *National League of Cities*. Operation of a railroad such as the LIRR is not an essential attribute of state sovereignty, and the Railway Labor Act, especially as recently amended, does not displace the State of New York's freedom to structure integral operations in areas of traditional governmental functions. Moreover, whatever minimal intrusion on matters of state sovereignty that may be perceived in the RLA is justified by the compelling and well-established federal interest in maintaining a proven mechanism for assuring labor peace and continuity of service on interstate rail carriers. In sum, the application of the RLA in the circumstances of this case cannot be said to impair the ability of the State of New York to "function effectively in a federal system." *National League of Cities, supra*, 426 U.S. at 852, quoting *Fry* v. *United States, supra*, 421 U.S. at 547 n.7.

### A. The Operation of the Long Island Railroad Does Not Constitute a Traditional Governmental Function

1. In overruling *Maryland* v. *Wirtz, supra*, which had upheld the constitutionality of the 1966 amendments to the FLSA bringing employees of government hospitals and schools within the ambit of that Act, the Court in *National League of Cities, supra*, specified that the publicly operated "schools and hospitals involved in *Wirtz* * * * each provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855 (footnote omitted).[11] The Court also listed

[11] In addition to schools and hospitals, the 1966 amendments to the FLSA expanded that Act's coverage to employees performing activities in

> the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such

"such areas as fire prevention, police protection, sanitation, public health, parks and recreation" as other examples of traditional "integral" state functions. *Id.* at 851, 855. However, the Court did not purport to offer "an exhaustive catalogue of [those] * * * activities which are well within the area of traditional operations of state and local government," and that accordingly may not be subject to federal commerce power legislation, providing other elements of the test announced by the Court are satisfied. *Id.* at 851 n.16.

Although the Court thus left unsettled the status of federal regulation affecting a broad range of state governmental functions (see, *e.g.*, *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705-706 (D.D.C. 1977) (three-judge court), on remand from *National League of Cities*), it did single out one activity as outside the scope of the Tenth Amendment's protection: a state's "operation of a railroad engaged in 'common carriage by rail in interstate commerce * * *.'" *National League of Cities, supra*, 426 U.S. at 854 n.18, quoting *United States* v. *California*, 297 U.S. 175, 182 (1936). The Court commented that "California's activity [in operating a railroad] was not in an area that the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 n.18.

The Court added (426 U.S. at 854 n.18) that "[f]or the same reasons * * * the holdings in *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 (1964), and *California* v. *Taylor*, 353 U.S. 553 (1957), are * * * unimpaired by our decision today." In *California* v. *Taylor*, *supra*, the Court upheld application of the RLA to a state-owned railroad so as to vest its employees with collective bar-

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railway or carrier is public or private or operated for profit or not for profit) * * *.

29 U.S.C. 203(r)(2). The states did not challenge this aspect of the 1966 amendments in *Maryland* v. *Wirtz*, *supra*, nor was it addressed by the Court in *National League of Cities* in overruling *Wirtz*. See 426 U.S. at 855.

gaining rights denied them by state law, notwithstanding the State's contention that this worked a denial of state sovereignty. And in *Parden* v. *Terminal Ry., supra*, the Court held that a state-owned railroad was subject to suit in federal court on a claim under the Federal Employers' Liability Act, notwithstanding the Eleventh Amendment. In each instance the Court recognized that by "leav[ing] the sphere that is exclusively its own and enter[ing] into activities subject to congressional regulation [the State] subjects itself to that regulation * * *." 377 U.S. at 196; see also *California* v. *Taylor, supra*, 353 U.S. at 568. These decisions, reaffirmed in *National League of Cities*, control this case, and require reversal of the decision of the court of appeals.

2. As the Court stated in *National League of Cities*, operation of a railroad participating in interstate commerce has not traditionally been regarded as a government function. Indeed, until quite recently, the operation of railroads in the United States has been reserved, with minor exceptions (such as terminal freight railroads), to private enterprise. *California* v. *Taylor, supra*, 353 U.S. at 563-564. Nearly commensurate with the long-standing tradition of private railway ownership and operation is the record of federal regulation of the operations of rail carriers—regulation consistently upheld by this Court as within Congress' power under the Commerce Clause. See, *e.g.*, *Napier* v. *Atlantic Coast Line*, 272 U.S. 605 (1926) (Boiler Inspection Act); *Southern Ry.* v. *Railroad Commission of Indiana*, 236 U.S. 439 (1915) (Safety Appliance Act); *Houston & Texas Ry.* v. *United States*, 234 U.S. 342 (1914) (Interstate Commerce Act); *Erie R.R.* v. *New York*, 233 U.S. 671 (1914) (Hours of Service Act); *Second Employers' Liability Cases*, 223 U.S. 1 (1912) (Employers' Liability Act of 1908); *Baltimore & Ohio R.R.* v. *ICC*, 221 U.S. 612 (1911) (Hours of Service Act). The Railway Labor Act itself, enacted in 1926 and substantially

amended in 1934, "evolved from legislative experimentation beginning in 1888." *California* v. *Taylor*, *supra*, 353 U.S. 557-559 & n.3.[12] Accordingly, the Court's oftenreaffirmed conclusions that by undertaking to operate a railroad participating in interstate commerce, a state subjects itself to federal regulation of such carriers, and that such regulation does not detract from the essential attributes of state sovereignty, are firmly anchored in the historical development of the railroad industry and the applicable law. By acquiring the LIRR, a carrier subject to the RLA, the State of New York accordingly assumed the obligations of a carrier under that Act.

Consideration of the history of the LIRR provides substantial support for the conclusion that operation of the railroad is neither a traditional function of the State of New York nor an essential attribute of state sovereignty. The LIRR was incorporated in 1834 and entered service in 1844. *Moody's Transportation Manual* 682 (1980). It was not until a century later, in 1966, that the LIRR was acquired by the Metropolitan Commuter Transportation Authority, predecessor to the respondent MTA, from the LIRR's corporate parent, the former Pennsylvania Railroad Company. *Ibid.* Thus, the LIRR has been an instrumentality of the State for only the most recent fraction of its history. It accordingly cannot be considered "within the area of traditional operations of state [or] local governments." *National League of Cities*, *supra*, 426 U.S. at 851 n.16, 852.

A striking indication of the fact that New York did not consider operation of the LIRR to be an integral

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[12] The RLA applies to carriers covered by the Interstate Commerce Act. 45 U.S.C. 151 First. The definition of carrier embodied in the Interstate Commerce Act today, 49 U.S.C. (Supp. III) 10501(a), is traceable to Section 1 of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379. See *California* v. *Taylor*, *supra*, 353 U.S. at 564 n.10. The latter enactment was a seminal exercise of Congress' commerce power; the subject of the legislation, of course, was the railroad industry.

government function is that, until the reorganization of the LIRR for the purposes of this very lawsuit (see pages 4-5, *supra*), employees of the LIRR were not, as a matter of state law, deemed "public employees." Compare N.Y. Pub. Auth. Law § 1265 (9) (a) (McKinney 1970) with N.Y. Civ. Serv. Law § 201(6) (a), (7) (a) and (8) (McKinney 1973 & Supp. 1980).[13] Indeed, as the district court noted (Pet. App. 31a, 36a), the LIRR has historically regarded itself as subject to the RLA,[14] has participated in and invoked the processes of the Act and the NMB throughout the period of MTA ownership,

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[13] The cited provision of the Public Authorities Law, specifically addressed to the MTA, states:

> Notwithstanding any provisions of the Civil Service Law, no officer or employee of a subsidiary corporation of the authority, other than a public benefit subsidiary corporation, shall be a public officer or a public employee.

In the absence of this provision, it appears that LIRR employees would be deemed public employees under the cited provisions of the New York Civil Service Law. And employees of the MTA itself, who are not employees of its subsidiary railroad corporation, have always been considered public employees subject to the Taylor Law. N.Y. Civ. Serv. Law § 201(6) (a), (7) (a), and (8). Finally, New York law provides that LIRR employees are not to be deemed employees of the MTA. Pub. Auth. Law § 1266(5) (McKinney 1970).

[14] In *Long Island R.R.* v. *Department of Labor*, 256 N.Y. 498, 515-517, 177 N.E. 17, 23-24 (1931), cited with approval in *California* v. *Taylor*, *supra*, 353 U.S. at 561 n.9, the Court of Appeals of the State of New York sustained the railroad's claim that the Railway Labor Act precludes application of state wage and hour legislation to its employees. The Court of Appeals observed that the RLA (256 N.Y. at 516-517, 177 N.E. at 24):

> provides a method for fixing wages of employees by free contract or adjustment of labor disputes. * * * Its purpose of ending labor disputes may be thwarted by any regulation of the State compelling payment of wages to "employees" at a different rate. It seems to us clear that Congress intended to exclude any interference by any State in the field of wages of employees of interstate carriers.

and continued to do so during the dispute that gave rise to this lawsuit, even after this action was commenced. It was only when the 60-day "cooling off" period provided by the then-applicable provisions of the RLA was about to expire that the MTA reorganized the LIRR as a public benefit subsidiary corporation, the employees of which are covered by the Taylor Law (see note 13, *supra*). In these circumstances the LIRR cannot be considered an integral, much less a traditional, function of state or local government.

3. The court of appeals declined to follow *United States* v. *California*, *supra*, despite the reaffirmation of the soundness of its result in *National League of Cities*. In distinguishing *California*, the court below relied on the fact that the State Belt Railroad provided only freight service, whereas the LIRR provides commuter passenger transportation, which, according to the court, "is now of necessity provided almost exclusively by state and local governments" (Pet. App. 17a). The court concluded that operation of the LIRR is an integral government function, based upon the observations that "it is a service that the state and local governments are particularly suited to provide because of the community-wide need" and that "the LIRR's passenger service is of much more importance to the public, in several respects, than was the state-operated freight line in *United States* v. *California*" (Pet. App. 18a).

The court of appeals' analysis is fundamentally flawed in several respects. First, the court failed to appreciate that invalidation of the RLA as applied to the LIRR requires a showing that the RLA addresses "matters that are indisputably 'attributes of state sovereignty' " within " 'areas of traditional functions.' " *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 21, quoting *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 845, 852. Neither test is satisfied here. When a state undertakes activities in commerce that are the "subject [of] congressional regulation," outside the traditional state governmental "sphere that is exclusively its

own," it "subjects itself to that regulation." *Parden* v. *Terminal Ry., supra*, 377 U.S. at 196. Thus, the court of appeals erred in assuming (Pet. App. 16a) that any important activity undertaken by state or local government upon the failure of private enterprise becomes an integral attribute of sovereignty that may not be the subject of federal regulation.[15]

Although the "catalog of essential state-provided services" may well, as the court of appeals declared, not be "static" (Pet. App. 16a), the importance of a subject of regulation to the state and its citizens is not in itself sufficient to establish an immunity from federal legislation. *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 397-398 (1951). It may well be that changing circumstances at times provide a sufficient basis for characterizing a non-traditional activity as an integral attribute of state sovereignty insulated against Acts of Congress that displace fundamental state decisions. But when a state government elects to expand its operations into a field that is not new, but is merely new to government, and that has long been subject to federal regulation pursuant to core aspects of the commerce

[15] The courts of appeals have held that state prisons, see *Wentworth* v. *Solem*, 548 F.2d 773 (8th Cir. 1977), and licensing and supervision of local highways, see *Peel* v. *Florida Dep't of Transportation*, 600 F.2d 1070 (5th Cir. 1979), are integral state functions. These functions traditionally have been performed by local governments, and there exists a general expectation among citizens that the municipality or state will continue to perform them. On the other hand, oil and gas production, see *Public Service Co. of North Carolina, Inc.* v. *FERC*, 587 F.2d 716 (5th Cir.), cert. denied, 444 U.S. 879 (1979), and telephone service, see *Puerto Rico Telephone Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977), have been held not to be traditional or integral state government functions. But see *State of Mississippi* v. *FERC*, No. J79-0212(c) (S.D. Miss. Feb. 19, 1981), prob. juris. noted, No. 80-1749 (June 15, 1981). While performance of the latter functions is undoubtedly important to the particular community or state involved, these services are regularly performed by private entities. Thus, there is no tradition or widespread expectation that states will provide them.

power, it cannot thereby acquire a Tenth Amendment immunity for the commercial activity undertaken.[16]

This case is readily distinguishable from *National League of Cities* in this respect. There, the Court considered the constitutionality of amendments to the FLSA that eliminated a long-standing exemption from the Act's coverage for state and local governments (see 426 U.S. at 836 & n.6), thereby thrusting the federal government into a regulatory role affecting fundamental and traditional functions of the states. Here, the situation is just the reverse. The State has deliberately assumed a role with scant historical precedent, placing itself in an industry that has been comprehensively regulated by the United States for nearly a century. Perhaps no other industry has been subjected to such prolonged and per-

[16] In *Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979), cited with approval by the court of appeals (Pet. App. 16a), the court held that municipal employees serving at a city-owned airport may not be covered by the FLSA. The Sixth Circuit abstracted four defining characteristics of the functions listed as protected ones in *National League of Cities*:

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a community-wide need for the service or activity.

598 F.2d at 1037. While we consider this enumeration incomplete in some respects, we note that the result reached by the Second Circuit in this case is inconsistent with this formulation. Service on the LIRR is not "available to the public at little or no direct expense," as is an airport to all travelers. Rather, the railroad is operated on a fee for service basis, and fares collected fund a major share of operating costs. See *Moody's Transportation Manual* 682 (1980). Nor is the ridership of the LIRR, although substantial, significant in comparison to the overall population of the area served (see Pet. 6). See also pages 24-29, *infra*. These attributes underscore the similarity between the LIRR and other commercial activities that are subject to federal commerce power legislation.

vasive federal supervision under the commerce power. Moreover, as this Court has noted, the RLA is the product of a unique industry-wide agreement upon a governing scheme for labor relations in the rail industry (*California* v. *Taylor*, *supra*, 353 U.S. at 557-558) and represents an

> instrument of industry-wide government. * * * The railroad world for which the Act was designed has been described as "a state within a state. Its population * * * lives according to rules of its own making * * *. This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established." Garrison, the National Railroad Adjustment Board; A Unique Administrative Agency, 46 Yale L. J. 567, 568-569 (1937).[17]

353 U.S. at 565-566 (citation omitted). Thus, whatever the rule might be in other instances in which a state or local government assumes a function formerly performed by private enterprise, the operation of a railroad by such a government entity cannot be regarded as an "integral operation[] in [an] area[] of traditional governmental functions," essential "to a separate and independent existence" or to the "States' ability to function effectively in a federal system." *National League of Cities*, *supra*, 426 U.S. at 845, 852, quoting *Lane County*

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[17] The Court in *Taylor* noted that "[b]argaining collectively * * * has often taken on a national flavor * * *." 353 U.S. at 567. Respondents assert (Br. in Opp. 5) that petitioner and other unions representing LIRR employees do not adhere to this tradition. Even if this is so—a question not addressed by either court below—the Court's statement (353 U.S. at 567) that

> Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force[,]

remains valid.

v. *Oregon*, *supra*, 74 U.S. (7 Wall.) at 76, and *Fry* v. *United States*, *supra*, 421 U.S. at 547 n.7.[18]

The court of appeals' decision also rests on a mistaken perception of the nature of the Long Island Railroad, which (even setting to one side the LIRR's freight service and longest passenger runs) is a commuter railroad,

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[18] "[B]y engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce." *Parden* v. *Terminal Ry.*, *supra*, 377 U.S. at 192 n.10, quoting *New York* v. *United States*, 326 U.S. 572, 582 (1946) (opinion of Frankfurter, J.); see also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 424 (1978) (opinion of Burger, C.J.) ("[T]he running of a business enterprise is not an integral operation in the area of traditional government functions."); cf. *Ball* v. *James*, No. 79-1740 (Apr. 29, 1981), slip op. 10-11. *New York* v. *United States*, *supra*, was one of a series of decisions by this Court upholding the application of the federal taxing power to state enterprises that are outside of the traditional scope of governmental functions. See *Massachusetts* v. *United States*, 435 U.S. 444, 457 (1978) (opinion of Brennan, J., collecting cases). In *National League of Cities*, the Court rejected the earlier reasoning of *United States* v. *California*, *supra*, to the effect that "the activities in which the states have traditionally engaged [which have been held to] mark[] the boundary of the restriction upon the federal taxing power" do not supply a like "limitation upon the plenary power to regulate commerce." 426 U.S. at 854, quoting 297 U.S. at 185. But nothing in *National League of Cities* suggests that the power to regulate commerce is *more* limited than the power to tax. See 426 U.S. at 843-844 n.14. And in *Helvering* v. *Powers*, 293 U.S. 214 (1934), this Court held that the Board of Trustees of the Boston Elevated Railway Company, a quasi-public street railway enterprise, could not share in the intergovernmental tax immunity of the State of Massachusetts. The Court's reasoning in *Powers* (*id.* at 227) is fully applicable here:

> [T]he State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [These circumstances] cannot be said to furnish a ground for immunity.

rather than a conventional public mass transit system.[19] This mischaracterization caused the court of appeals to rely upon the erroneous premise that the LIRR provides service of a kind that "is now of necessity provided

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[19] This distinction, overlooked by the court below, is firmly grounded in the separate histories of these two sectors of the transportation industry, in the applicable law, and in the usages of the industry. A "commuter railroad" is defined by the American Public Transit Association (APTA) as

> [t]hat portion of "main-line railroad" (not "electric railway") transportation operations which encompasses urban passenger train service for local short-distance travel between a central city and adjacent suburbs; suburban rail passenger service—using both locomotive-hauled and self-propelled railroad passenger cars—is characterized by multi-trip tickets, specific station-to-station fares, railroad employment practices, and usually only one or two stations in the central business district.

*Transit Fact Book* 7 (1978-1979 ed.); see also note 9, *supra* (definition of commuter rail service applicable to RLA amendments in the Omnibus Budget Reconciliation Act of 1981). By contrast, a "transit system" is defined as

> [a]n organization providing intraurban common-carrier passenger service over at least one regular fixed route with a published time schedule, not including variable-route service, unscheduled service, or interurban service.

*Transit Fact Book, supra*, at 9. Transit systems include operation of bus systems as well as rapid transit, which represents

> [t]ransit vehicles operating over completely grade-separated private right-of-way. The term rail rapid transit, also known as "rapid rail transit," applies to both operation of light rail vehicles over exclusive private right-of-way and operation of heavy rail vehicles; the term bus rapid transit applies to operation of motor buses over exclusive bus roads ("rapid busways").

*Ibid.* Light rail and heavy rail rapid transit are defined respectively as

> [s]treet-type transit vehicle railway constructed on city streets, semiprivate right-of-way, and exclusive private right-of-way;

almost exclusively by state and local governments" (Pet. App. 17a).

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> formerly known as "streetcar" ("trolley car") and "subway-surface" depending upon local usage or preference[,]

*id.* at 8, and

> [s]ubway-type transit vehicle railway constructed on exclusive private right-of-way with high-level platform stations; formerly known as "subway" or "elevated (railway)."

*Ibid.* Commuter railroads are also described by the APTA as providing "transportation to the distant suburbs of America's largest cities." *Id.* at 74. The APTA reports data on commuter railroads separately from that pertaining to transit systems. *Id.* at 3.

The RLA itself incorporates a distinction between rapid transit systems and commuter rail operations. Since its enactment, the RLA has exempted from its coverage "any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but * * * not * * * any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power." 45 U.S.C. 151 First; see Pet. App. 10a; compare 29 U.S.C. 203(r)(2) (1966 amendment to FLSA expanding its coverage to, *inter alia*, "street, suburban or interurban electric railway[s]"; see note 11, *supra*). In the courts below respondents contended unsuccessfully that if Congress had foreseen the future evolution of the LIRR, it would have excluded operations of its kind from the RLA. The court of appeals declined to interpolate such an exception into the Act, stating that "any change in the regulation of this type of rail carrier must be left to Congress" (Pet. App. 10a). Congress has now addressed this issue and has determined not to exempt employees of publicly-owned commuter railroads from the RLA (see pages 8-11, *supra*, and pages 34-35, *infra*).

As is reflected in the definitions and statutory provisions cited above, one important attribute of commuter railroads is their genesis as a part of the railroad industry, rather than as a form of intraurban transit. The LIRR typifies a commuter railroad in this respect. Throughout most of the railroad's history much of the territory served would have been considered far distant from the City of New York, and this remains true of some of the railroad's service area even today (see page 3, *supra*). Another special attribute of commuter carriers is the discount fare for multiple trips (see pages 9 note 9 and 25 note 19, *supra*). This convention reflects the hybrid character of the commuter carrier—the discount serves as a form of price competition to encourage usage by regular com-

The LIRR is one of 17 commuter railroads in operation in the United States. American Public Transit Association, *Transit Fact Book* 74 (1978-1979 ed.). Of the 17 systems, only two are publicly owned and operated [20]—

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muters, while at the same time allowing the railroads to recoup larger fares from the more casual or infrequent user.

In this case, we express no view as to whether conventional publicly-owned mass transit systems are to be regarded as "integral operations in areas of traditional government functions," essential to sovereignty, such that fundamental state decisions concerning such systems may not be overborne by an Act of Congress pursuant to the Commerce Clause.

[20] By contrast, there are over 1,000 transit systems in the United States. *Transit Fact Book, supra*, at 48. Although also a relatively recent development in most areas of the United States, public ownership and operation of conventional transit systems is substantially better established than is such operation of commuter railroads. In 1979 nearly half of these systems, including most of the largest ones, carrying a total of 91% of all transit passengers, were owned by public agencies. *Id.* at 55; see also *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency* ("*UMTA Hearings*"), 88th Cong., 1st Sess. 313 (1963) (testimony of George W. Anderson). According to the APTA (*Transit Fact Book, supra*, at 55):

> Public ownership of transit is a recent development. While the first publicly-owned transit system in the United States began operation in 1904, by World War II only 35 street railways and motor bus systems—carrying 7% of America's transit riders—were publicly owned. The shift from private to public ownership accelerated in the post-war years with over 50% of transit riders carried by publicly owned transit systems in 1967 and 91% riding publicly owned transit by 1978.

The shift from private to public ownership of transit systems was especially rapid in the years following 1960. In 1960, only 64 of 1,251 operating transit systems were publicly owned. *UMTA Hearings, supra*, at 27 (testimony of Robert Weaver). These included many of the largest systems, however. *Id.* at 313 (testimony of George W. Anderson). Enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. 1601 *et seq.*, authorizing capital grants and operating assistance for public mass transit systems, has evidently assisted the development of public transit systems. The LIRR has also been a beneficiary of such grants. *Moody's Transportation Manual* 682 (1980).

the LIRR and the Staten Island Rapid Transit Operating Authority (SIRTOA), both by the respondent MTA. *Id.* at 75.[21] To be sure, at the end of 1979 four other commuter railroads were owned by a public agency—but these are operated by interstate carriers under contract with a governmental agency and their employees are not government employees. *Ibid.* The remaining railroads are owned and operated by interstate rail carriers. *Ibid.*[22] Thus, examination of the commuter sector of the railroad industry reflects, not that this form of service has progressively become an integral part of local government functions, but that it remains a part of the railroad industry and interstate commerce.[23] Although governmental entities are assuredly assuming a larger role in the maintenance of commuter rail service, the MTA is

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[21] SIRTOA was acquired by the MTA in 1971 from the City of New York, which in turn acquired it from the Baltimore & Ohio Railroad in 1970. *Moody's Transportation Manual, supra,* at 597-598; *Locomotive Engineers* v. *Rapid Transit Auth.*, 100 L.R.R.M. 3154, 3155 (E.D.N.Y. 1979). Unlike the LIRR (see pages 4-5 and 18-20, *supra*), SIRTOA apparently was organized as a public benefit subsidary corporation from the time of its acquisition by public agencies. *Ibid.*

[22] Every operator of a commuter railroad is a carrier subject to Interstate Commerce Commission jurisdiction. See *Transit Fact Book, supra,* at 75; *Moody's Transportation Manual, supra,* at 1, 26, 132, 504, 517, 576, 610, 642, 767, 891, 896, 1215, 1852. Indeed, all but one of the non-MTA commuter railroads is operated by a carrier rated as a Class 1 carrier by the Interstate Commerce Commission. *Moody's Transportation Manual, supra,* at a4. The LIRR is also so rated. *Ibid.* Such carriers have annual gross revenues of $50,000,000 or more. Class 1 carriers "operate 92 percent of the total railway mileage of the United States, employ 94 percent of the nation's railroad workers, and handle 97 percent of the railway freight traffic * * *." *Ibid.* The Consolidated Rail Corporation ("Conrail") operates six commuter railroads. *Transit Fact Book, supra,* at 75.

[23] Several commuter railroads actually provide interstate passenger service because of the location of the city that is the terminus of operations. See, *e.g.*, *Moody's Transportation Manual, supra,* at 1852 (Chicago South Shore & South Bend Railroad).

unique in that it actually operates commuter rail service with government employees. Accordingly, there is no foundation in fact for the court of appeals' conclusion that the LIRR's service is of a kind "provided almost exclusively by state and local governments" (Pet. App. 17a).

Finally, it is important to note that, in both its passenger and its freight operations, the LIRR constitutes an integral part of a nationwide rail transportation network.[24] As a freight carrier the LIRR inter-

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[24] The court of appeals relied (Pet. App. 17a-18a) on the fact that California's State Belt Railroad, considered in *United States* v. *California*, *supra*, provided only freight service. But nothing in that decision, or the decisions in *California* v. *Taylor*, *supra*, and *Parden* v. *Terminal Ry.*, *supra*, turned on the nature of the service provided. Moreover, as is explained in the text, the passenger operation of the LIRR does not render it essential to the State's sovereignty or an integral operation in an area of traditional government functions.

In any event, the court of appeals incorrectly assumed that passenger operations are matters of purely local interest, whereas freight operations are matters of purely federal interest, and that the two need only be weighed against each other to determine which is predominant. On the contrary, the State Belt Railroad undoubtedly was of vital importance to the economy of San Francisco. See *United States* v. *California*, *supra*, 297 U.S. at 181-182. At the same time, the federal interest, as announced in the Interstate Commerce Act, extends to passenger service as well as freight. See 49 U.S.C. (Supp. III) 10501(a), (b). The passenger operation of a railroad that is part of a national industry with a uniform scheme for handling labor disputes and that serves the Nation's commercial and financial center—New York City—is assuredly a subject of legitimate concern for Congress. The court of appeals' analysis is doubly flawed, because the fact that the State has a more focused interest in the commuter operation of the LIRR than does the United States (see Pet. App. 24a) cannot be controlling. The same could be said of California's State Belt Railroad, and indeed was said, without avail, of the privately-owned public utility at issue in *Bus Employees* v. *Wisconsin Board*, *supra*, 340 U.S. at 397-398.

We note, however, that the LIRR does provide substantial freight service in interstate commerce (Pet. App. 9a, 34a-35a). In addi-

changes cars with carriers serving shippers from all regions of the United States (Pet. App. 34a; J.A. 25). The court of appeals acknowledged that the "LIRR's freight service provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight" (Pet. App. 9a, 24a), but it unaccountably failed to recognize that the LIRR's passenger service plays a similar role. Like other commuter railroads (see note 19, *supra*), the LIRR funnels passengers from nearby and distant surburban areas into a single terminal location in the central business district of the city served —in this instance New York City's Pennsylvania Station. At Pennsylvania Station, however, the LIRR also connects with rail passenger lines serving the entire Nation, particularly the important Northeast Corridor. As an important part of a national rail transportation system, the LIRR is properly subject to the uniform national scheme governing railway labor disputes. Compare *National League of Cities*, *supra*, 426 U.S. at 856 (Blackmun, J., concurring); see *California* v. *Taylor*, *supra*, 353 U.S. at 567.

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tion, the role assumed by commuter passenger service in the LIRR's operations is unique among operators of commuter railroads. The remaining carriers derive the great majority of their business from freight operations. See *Moody's Transportation Manual*, *supra*, note 22. This marriage of commuter and freight operations in a single carrier, with a single labor force, renders the court of appeals' analysis unworkable.

### B. The Railway Labor Act Does Not Intrude Significantly Upon Important State Decisions in the Management of the LIRR.

The court of appeals concluded that the application of the RLA to LIRR employees displaces "essential government decisions" because it overrules the State's prohibition of strikes and could result in higher wages as a result of the bargaining power conferred on employees by the preservation of the possibility of a strike (Pet. App. 14a-15a). Neither of these circumstances supports the decision below. Moreover, any merit that the court of appeals' conclusion may once have had has been eliminated by the recent amendments to the Railway Labor Act.

1. Unlike the Fair Labor Standards Act considered in *National League of Cities, supra*, 426 U.S. at 846-851, which imposes substantive requirements respecting the fundamental terms of employment, the Railway Labor Act places no substantive obligations on the respondent MTA as operator of the LIRR. Rather, the obligations imposed are procedural; the Act does not require a carrier to pay any particular wage or agree to any particular proposal in bargaining. Moreover, as the court of appeals acknowledged (Pet. App. 23a-24a), the ultimate objectives of the RLA and New York's Taylor Law are fully compatible,[25] and the provisions of state

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[25] The purposes of the RLA are (45 U.S.C. 151a; emphasis added):

> (1) *To avoid any interruption to commerce or to the operation of any carrier engaged therein*; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this [Act]; (4) *to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working condi-*

law parallel those of the RLA in some significant respects.[26]

Of course, the state and federal laws diverge on the key point at issue here—the right to strike—but this was equally true in *California* v. *Taylor*, *supra*, 353 U.S. at 559-561.[27] The right to strike preserved by the RLA, however, is far from absolute and is not an end in itself; on the contrary, it is a critical element of the RLA's carefully crafted scheme for preventing interruptions in rail service, pursuant to the overriding federal interest in assuring the uninterrupted flow of interstate commerce. *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 381 (1969) (see note 27, *supra*). As

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*tions*; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

[26] The court of appeals inexplicably concluded that this circumstance tended to demonstrate the unconstitutionality of the RLA. This stands the proper analysis on its head. In order to succeed with a *National League of Cities* claim, the claimant must affirmatively show impermissible displacement of state prerogatives. *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 21.

[27] The court of appeals sought to distinguish *Taylor* (Pet. App. 24a) by observing that the state law there at issue conflicted with the RLA in more respects than does the Taylor Law. But this circumstance cannot support the court of appeals' distinction because, on the court's theory, *Taylor* sanctioned a more sweeping "intrusion" into state decision-making than that contemplated here. In any event, the district court correctly characterized the Taylor Law's "abridgement of the right to strike * * * [as] a direct assault upon the heart of the federal scheme of labor relations in the railway industry" (Pet. App. 39a). As the Court declared in *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 381 (1969) (emphasis in original):

> The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in *any* self-help.

the Court recognized in *California* v. *Taylor*, *supra*, 353 U.S. at 566 (footnote omitted), "[t]he fact that, under state law * * * employees * * * may have no legal right to strike reduces, but does not eliminate, the possibility of a work stoppage." Noting that "[i]t was to meet such a possibility that the [RLA's] 'reign of law' was established" (*ibid.*), the Court remarked that the Act has proven to be the most effective means available of preventing interruptions in rail services. *Ibid.*[28] Moreover, the mediation procedures prescribed by the RLA (see note 3, *supra*), which must be exhausted prior to resort to self help, have been characterized as "interminable." *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969); see also *Railway Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238, 246 (1966). Indeed, the Court has declared that "the major purpose of Congress in [enacting] the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O.R.R.* v. *Railway Clerks*, 281 U.S. 548, 565 (1930). Thus, application of the RLA to the LIRR would not "directly impair" the State's ability to structure operations or make fundamental decisions affecting the railroad.[29]

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[28] The NMB reports that more than 97% of the cases mediated under the RLA have been resolved without resort to a strike. *Forty-Fifth Annual Report* 1 (1980). In this vein, petitioner (Pet. 17) points to statistics of New York's Public Employment Relations Board regarding the effectiveness of the Taylor Law in preventing public employee strikes. Between September 1967 and December 1980, there were 279 strikes by public employees covered by the Taylor Law, resulting in 4,105,000 lost work days. Within that time nine public transit employee strikes occurred, resulting in 370,500 lost work days (Pet. App. 77a). In sharp contrast, prior to the LIRR's six-day strike in December 1979, which was a part of the dispute leading to this litigation, there was but a single work stoppage by LIRR employees—in November 1972—subsequent to New York's purchase of the railroad in 1966 (Pet. App. 81a).

[29] On the other hand, the court of appeals' decision threatens to undermine and complicate the National Mediation Board's

2. The amendments to the Railway Labor Act (see pages 8-10, *supra*) enacted subsequent to the grant of certiorari eliminate whatever modest intrusion upon state decision-making the RLA might previously have been thought to present. As amended, the already "interminable" processes of the RLA designed to delay and discourage strikes are substantially lengthened. And the ability of publicly-owned and operated commuter railroads and the Governors of the states they serve to avoid strikes is substantially increased. Under the amended statute, any such carrier or Governor has an absolute right to obtain a "cooling off" period of as much as 240 days, four times the period applicable to private carriers, after the failure of the mediation process. Unlike

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administration of the Railway Labor Act. In the wake of the court's ruling, the NMB has determined that it must withhold its mediation services in disputes involving the LIRR, but has decided to continue to handle LIRR representational cases and arbitration matters under the RLA. *In the Matter of Long Island Railroad Co., etc.*, 8 NMB No. 89 (interim order, Mar. 9, 1981) (Pet. App. 63a-73a). The MTA, LIRR and the Staten Island Rapid Transit Operating Authority have contested the NMB's exercise of even this limited jurisdiction. *Metropolitan Transportation Authority* v. *National Mediation Board*, Civ. No. 81-0721 (E.D.N.Y., filed Mar. 11, 1981).

In its brief as amicus curiae, the New York State Public Employment Relations Board (PERB) argues that either the RLA or the Taylor Law should be held applicable in its entirety to the LIRR, and the other statutory scheme held to be entirely preempted, but the PERB takes no position as to which statute should apply (Br. 1-2). This submission by an agency of the State of New York tends to confirm our view that the RLA, if applied to the LIRR, would not displace the State's ability to make essential governmental decisions. The PERB also recognizes the integral relationship between the right to strike preserved by the RLA and the other provisions of that statute, stating (Br. 4) that "[t]he Taylor Law does not structure [employer-employee] relationships simply through prohibiting the strike any more than the RLA does so merely by allowing for such self-help."

privately-owned carriers, publicly-owned commuter railroads need not convince the NMB that a regional economic emergency is threatened and need not convince the President that he should exercise his discretion to establish an emergency board. Compare 45 U.S.C. 160. The new process is also designed to provide substantial incentives for reasonableness in bargaining by subjecting the positions of the parties to public scrutiny and ultimately imposing the penalty of forfeiture of railroad unemployment insurance benefits for the duration of any strike caused by unjustified union intransigence.

These special advantages for publicly-owned commuter authorities reflect congressional awareness of the sensitive considerations of federalism involved. See H.R. Rep. No. 97-153, *supra*, at 3. Even more than the general scheme of the Railway Labor Act, as applied in this case, the new provisions of the Act "were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time" (*National League of Cities*, *supra*, 426 U.S. at 853, distinguishing and reaffirming *Fry* v. *United States*, *supra*)—here, the emergency period created in the rare instances in which the mediation procedures of the RLA fail to avert a work stoppage. And in such instances, as in *Fry*, the statutory scheme provides substantial benefits to the state. See 426 U.S. at 853.

In sum, where, as here, Congress has recognized the competing state and federal interests and has effected a reasonable accommodation that fully protects the concerns of the states, nothing in the Tenth Amendment or *National League of Cities* requires that the congressional scheme be cast aside. Congress has determined that the federal interest in maintaining the channels of interstate commerce requires that the LIRR be subject, like other railroads, to the provisions of the Railway Labor Act. In the circumstances of this case, there is no constitutional impediment to that legislative judgment.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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